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In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

PHILIP MORRIS USA, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI (VOLUME 1)

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TABLE OF CONTENTS

Page

Volume 1

Appendix A — Court of appeals opinion (May 22, 2009) 1a

Appendix B — Court of appeals opinion (Feb. 4, 2005) 99a

Appendix C — District court memorandum opinion (May 21, 2004) 177a

Appendix D — Court of appeals memorandum opinion (Sept. 28, 2000) 196a

Appendix E — Court of appeals order (Sept. 22, 2009) 246a

Appendix F — Court of appeals order (Sept. 22, 2009) 248a

Appendix G — Court of appeals order (Apr. 19, 2005) 250a

Appendix H — Court of appeals order (Apr. 19, 2005) 252a

Appendix I — Statutory provisions 254a

Volume 2

Appendix J — Excerpt of district court final opinion (Aug. 17, 2006) 258a

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 06-5267, 06-5268

UNITED STATES OF AMERICA, UNITED STATES DEPARTMENT OF JUSTICE, ET AL., APPELLEES

v.

PHILIP MORRIS USA INC., FORMERLY KNOWN AS PHILIP MORRIS INCORPORATED, ET AL. APPELLEES

BRITISH AMERICAN TOBACCO (INVESTMENTS) LTD., DIRECTLY AND AS SUCCESSOR TO BRITISH-AMERICAN TOBACCO COMPANY, LTD., APPELLANT

THE COUNCIL FOR TOBACCO RESEARCH-USA, INC., ET AL., APPELLEES

Decided: May 22, 2009

Before: SENTELLE, Chief Judge, TATEL and BROWN, Circuit Judges.

Opinion for the Court filed PER CURIAM.

PER CURIAM:

Defendants in this action, cigarette manufacturers and trade organizations, appeal from the district court's judgment finding them liable for conducting the affairs of their joint enterprise through a pattern of mail and wire fraud in a scheme to deceive American consumers. They also appeal from the district court's remedial order, which imposes numerous negative and affirmative

duties on Defendants. The government and intervenors cross-appeal from the district court's denial of additional requested remedies. After considering all of the parties' arguments, we affirm in large part the finding of liability, remanding only for dismissal of the trade organizations. We also largely affirm the remedial order, including the denial of additional remedies, but vacate the order with regard to four discrete issues, remanding for further proceedings as directed in this opinion.

I. Background

The United States initiated this civil action under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968, in 1999. The government alleged that nine cigarette manufacturers and two tobacco-related trade organizations violated section 1962(c) and (d) of the Act. Those subsections make it unlawful for "any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity" or to conspire to do so. 18 U.S.C. § 1962(c), (d). The eleven Defendants were Philip Morris, Inc., now Philip Morris USA, Inc. ("Philip Morris"); R.J. Reynolds Tobacco Company, now Reynolds American ("Reynolds"); Brown & Williamson Tobacco Company, now part of Reynolds ("Brown & Williamson"); Lorillard Tobacco Company ("Lorillard"); The Liggett Group, Inc. ("Liggett"); American Tobacco Company, which merged with Brown & Williamson and is now part of Reynolds ("American"); Philip Morris Companies, now Altria ("Altria"); British American Tobacco (Investments) Ltd. ("BATCo"); B.A.T. Industries p.l.c., now part of BATCo

("BAT Industries"); The Council for Tobacco Research—USA, Inc. ("CTR"); and The Tobacco Institute, Inc. ("TI"). The last two entities are trade organizations the cigarette manufacturers created; they do not manufacture or sell tobacco products. The district court dismissed BAT Industries from the case for lack of personal jurisdiction.

The government alleged that Defendants violated and continued to violate RICO by joining together in a decades-long conspiracy to deceive the American public about the health effects and addictiveness of smoking cigarettes. Specifically, the government alleged that Defendants fraudulently denied that smoking causes cancer and emphysema, that secondhand smoke causes lung cancer and endangers children's respiratory and auditory systems, that nicotine is an addictive drug and Defendants manipulated it to sustain addiction, that light and low tar cigarettes are not less harmful than full flavor cigarettes, and that Defendants intentionally marketed to youth. *United States v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 1, 27 (D.D.C. 2006). In addition, the government alleged that Defendants concealed evidence and destroyed documents to hide the dangers of smoking and protect themselves in litigation. *Id.* The government identified 148 racketeering acts of mail and wire fraud Defendants allegedly committed in furtherance of their scheme. Although the district court did not allow the government to prove 650 additional racketeering acts due to their late disclosure, the court did permit the government to introduce evidence supporting those acts to prove other RICO elements, such as the continuity and pattern of racketeering activity, the RICO enterprise and conspiracy, and Defendants' participation in the enterprise.

After years of pretrial proceedings and discovery, the case went to trial in September 2004. The bench trial lasted nine months and included live testimony from 84 witnesses, written testimony from 162 witnesses, and almost 14,000 exhibits in evidence. The government presented evidence that the presidents of Philip Morris, Reynolds, Brown & Williamson, Lorillard, and American assembled together in 1953 to strategize a response to growing public concern about the health risks of smoking and jointly retained a public relations firm to assist in the endeavor. *Id.* at 37. From the beginning they agreed that no cigarette manufacturer would "seek a competitive advantage by inferring to its public that *its* product is less risky than others"; they would make no "claims that special filters or toasting, or expert selection of tobacco, or extra length in the butt, or anything else, makes a given brand less likely to cause you-know-what." *Id.* (quoting public relations firm's Planning Committee Memorandum). Acting on this agreement, the cigarette manufacturers jointly issued "A Frank Statement to Cigarette Smokers," published as a full-page advertisement in newspapers across the country on January 4, 1954. *Id.* at 39. "The Frank Statement set forth the industry's 'open question' position that it would maintain for more than forty years—that cigarette smoking was not a proven cause of lung cancer; that cigarettes were not injurious to health; and that more research on smoking and health issues was needed." *Id.* All of the Defendant manufacturers eventually joined this collective effort.

The government presented evidence from the 1950s and continuing through the following decades demonstrating that the Defendant manufacturers were aware —increasingly so as they conducted more research—

that smoking causes disease, including lung cancer. Evidence at trial revealed that at the same time Defendants were disseminating advertisements, publications, and public statements denying any adverse health effects of smoking and promoting their "open question" strategy of sowing doubt, they internally acknowledged as fact that smoking causes disease and other health hazards. *Id.* at 146, 164, 168-69. Although the manufacturers conducted their own research and public relations regarding health and other issues, they also relied in part on a series of jointly-created entities. Among these entities were Defendants TI and CTR (formerly the Tobacco Industry Research Committee). The Defendant manufacturers created TI and CTR, composed their membership, staffed their boards of directors with executives from the manufacturers, and maintained frequent communication between high-level manufacturer and joint-entity officials. *Id.* at 43-44, 63. Evidence at trial showed that TI and CTR conducted the manufacturers' joint public relations through false and misleading press releases and publications, trained representatives from the manufacturers regarding their coordinated industry message, conducted some cigarette testing for the manufacturers, and funded "special projects" to produce favorable research results and witnesses specifically for use in litigation and for support of industry public statements. *Id.* at 66, 82, 86, 87, 91.

In addition to the health hazards of smoking, the government presented evidence that Defendants intimately understood the addictiveness of nicotine and manipulated nicotine delivery in cigarettes to create and sustain addiction. Evidence showed that Defendants undertook extensive research into the physiological impact of nicotine, how it operates within the human body, and how

the physical and chemical design parameters of cigarettes influence the delivery of nicotine to smokers. *Id.* at 208, 308-09. As a result of this research, they recognized and internally acknowledged that smoking and nicotine are addictive and they engineered their products around creating and sustaining this addiction. Evidence at trial suggested that despite this internal knowledge, for decades Defendants publicly denied and distorted the truth about the addictive nature of their products, suppressed research revealing the addictiveness of nicotine, and denied their efforts to control nicotine levels and delivery. *Id.* at 209, 309.

The government also presented evidence tending to show that Defendants marketed and promoted their low tar brands to smokers—who were concerned about the health hazards of smoking or considering quitting—as less harmful than full flavor cigarettes despite either lacking evidence to substantiate their claims or knowing them to be false. *Id.* at 430. Internal industry documents introduced at trial revealed that by the late 1960s and early 1970s, Defendants were aware that lower tar cigarettes are unlikely to provide health benefits because they do not actually deliver the low levels of tar and nicotine advertised. *Id.* at 430-31. Defendants researched and understood the phenomenon whereby smokers of low tar cigarettes, to satisfy their addiction, modify their smoking behavior to compensate for the reduced nicotine yields by "taking more frequent puffs, inhaling smoke more deeply, holding smoke in their lungs longer, covering cigarette ventilation holes with fingers or lips, and/or smoking more cigarettes." *Id.* at 431. As a result of this nicotine-driven behavior, smokers of low tar cigarettes boost their intake of tar, so that lower tar cigarettes do not result in lower tar intake and

therefore do not yield the touted health benefits or serve as a step toward quitting smoking. *Id.* Evidence at trial suggested that Defendants understood this concept—for some time, better than the public health community or government regulators—while they promoted lower tar cigarettes as "health reassurance" brands.

Regarding secondhand smoke, the government presented evidence suggesting that Defendants became aware that secondhand smoke poses a health risk to nonsmokers but made misleading public statements and advertisements about secondhand smoke in an attempt to cause the public to doubt the evidence of its harmfulness. *Id.* at 692. At trial, internal industry documents revealed that Defendants believed the public perception of secondhand smoke could determine the industry's survival and that secondhand smoke research by the cigarette manufacturers was a sensitive issue due to the absence of "objective science" supporting their position and the risk that their own research would lead to unfavorable results. *Id.* at 733. As a result, the manufacturers jointly created the Center for Indoor Air Research ("CIAR") to coordinate and fund their secondhand smoke research with the appearance of independence. *Id.* at 119, 735. The evidence also showed that they "created, controlled, used, or participated in" a vast array of foreign or international entities to conduct their sensitive secondhand smoke research, generate "marketable science" to use for public relations purposes, and coordinate their shared objectives and message. *Id.* at 119-20, 759.

In addition to these topics, the government also presented evidence to the district court regarding Defendants' targeted marketing to youth under twenty-one

years of age and their denials of such marketing, *id.* at 561, 672, as well as evidence concerning Defendants' employees and attorneys destroying documents relevant to their public and litigation positions and suppressing or concealing scientific research, *id.* at 801, 832.

During the trial, this court rendered a decision on Defendants' interlocutory appeal from the denial of summary judgment on the government's claim for a disgorgement remedy under RICO section 1964(a). We reversed the district court and held that disgorgement is not an available remedy in civil RICO cases. *United States v. Philip Morris USA, Inc. ("Disgorgement Opinion")*, 396 F.3d 1190 (D.C. Cir. 2005). In response, the district court granted the government leave to reformulate its proposed remedies. After the liability phase of the trial, the district court held a fourteen-day remedies trial. At the close of the remedies phase, several organizations moved to intervene in the litigation to assert their interests in the proposed remedies. The district court granted the American Cancer Society, the American Heart Association, the American Lung Association, Americans for Nonsmokers' Rights, the National African American Tobacco Prevention Network, and the Tobacco-Free Kids Action Fund leave to intervene solely on the subject of remedies.

The district court entered final judgment against Defendants on August 17, 2006, finding that they maintained an illegal racketeering enterprise and each Defendant participated in the conduct, management, and operation of the enterprise in violation of section 1962(c), and that they explicitly and implicitly agreed to do so, in violation of section 1962(d). *Philip Morris*, 449 F. Supp. 2d at 851, 901. The court found that Defen-

dants engaged in a scheme to defraud smokers and potential smokers by (1) falsely denying the adverse health effects of smoking, *id.* at 854; (2) falsely denying that nicotine and smoking are addictive, *id.* at 856; (3) falsely denying that they manipulated cigarette design and composition so as to assure nicotine delivery levels that create and sustain addiction, *id.* at 858; (4) falsely representing that light and low tar cigarettes deliver less nicotine and tar and therefore present fewer health risks than full flavor cigarettes, *id.* at 859; (5) falsely denying that they market to youth, *id.* at 861; (6) falsely denying that secondhand smoke causes disease, *id.* at 864; and (7) suppressing documents, information, and research to prevent the public from learning the truth about these subjects and to avoid or limit liability in litigation, *id.* at 866. The court concluded that the government failed to prove that Defendants deliberately chose not to utilize or market feasible designs or product features that could produce less hazardous cigarettes. *Id.* at 384.

Before granting injunctive relief against Defendants the district court assessed whether they presented a "reasonable likelihood of further violation(s) in the future." *Id.* at 909 (quoting *SEC v. Savoy Indus., Inc.*, 587 F.2d 1149, 1168 (D.C. Cir. 1978)). The court concluded that Philip Morris, Reynolds, Brown & Williamson, Lorillard, American, Altria, and BATCo were reasonably likely to commit future RICO violations unless enjoined because they continued to make false and misleading statements at the time of trial, their businesses presented continuing opportunities to commit RICO violations, and their corporate leadership continued to consist of veteran employees with longstanding ties to the companies. *Id.* at 910-13. Defendants argued that no injunction was necessary because their Master Set-

tlement Agreement with forty-six states and the District of Columbia and their individual settlements with four states already sufficiently restrained them. The district court rejected this argument, concluding that the Master Settlement Agreement did not obviate the need for injunctive relief because Defendants had not fully complied with the agreement, parts of the agreement began expiring in 2006, the states could not vigorously enforce all aspects of the agreement, and BATCo and Altria were not subject to the settlement agreement. *Id.* at 913-15.

The district court found that three Defendants—CTR, TI, and Liggett—did not present a reasonable likelihood of future RICO violations, therefore the court did not order injunctive remedies against them. CTR and TI, the court found, now exist solely for the limited purpose of winding up their activities and each retains only one adviser to support its litigation defense and handle any remaining administrative matters. *Id.* at 915-18. The court found that Liggett withdrew from the RICO conspiracy by admitting that smoking causes cancer and is addictive, by voluntarily restricting its advertising and including disclosures on its packages, and by cooperating with the United States and state attorneys general in their claims against other tobacco companies. *Id.* at 906-07, 918-19. The district court concluded that Liggett was not reasonably likely to commit future RICO violations based on this withdrawal, its continued independence from the other Defendants, and its limited opportunity for future violations by virtue of its discount cigarette market and lack of traditional consumer advertising. *Id.* at 918-19.

Pursuant to section 1964, the district court imposed injunctive remedies against the other seven manufacturer Defendants. Specifically, the court ordered Defendants (1) to refrain from any acts of racketeering relating to the manufacturing, marketing, promotion, health consequences, or sale of cigarettes in the United States; (2) not to participate in the management or control of CTR, TI, or CIAR, and not to reconstitute the form or function of those entities; (3) to refrain from making any material false, misleading, or deceptive representation concerning cigarettes that is disseminated to the United States public; (4) to cease using any express or implied health message or health descriptor for any cigarette brand, such as light or low tar; (5) to make corrective disclosures about addiction, the adverse health effects of smoking and secondhand smoke, their manipulation of cigarette design and composition, and light and low tar cigarettes; (6) to create document depositories providing the government and the public access to all industry documents disclosed in litigation; and (7) to provide their disaggregated marketing data to the government according to the schedule on which they provide it to the Federal Trade Commission. *Id.* at 938-45. The court also limited the sale and transfer of Defendants' brands, product formulas, and businesses to entities that either are subject to the injunctive order or will sell the brand, use the formula, or conduct the business exclusively outside the United States. *Id.* at 945.

The district court denied the remainder of the government's requested injunctive relief, including its proposed national smoking cessation program, public education and counter-marketing campaign, and youth smoking reduction plan. *Id.* at 933-34, 936-37. The court also denied the government's requests that it ap-

point a monitor to investigate and restructure the Defendant companies, *id.* at 935, and that it order Defendants to make public all "health and safety risk information" about their products in their own files, *id.* at 929.

All Defendants except Liggett appealed, raising numerous challenges to the finding of liability and the remedies imposed. The government and the intervenors filed a cross-appeal regarding the remedies that the district court denied. On Defendants' motion we stayed the remedial injunction pending appeal.

We review the district court's conclusions of law *de novo*. *SEC v. Wash. Inv. Network*, 475 F.3d 392, 399 (D.C. Cir. 2007). To the extent it is not based on legal error, we review the district court's decision to issue an injunction for abuse of discretion. *Id.* We may not set aside the district court's findings of fact unless they are clearly erroneous, giving due regard to the court's opportunity to judge the witnesses' credibility. *Id.* (citing FED. R. CIV. P. 52(a)(6)). This standard applies even when the district court adopts a party's proposed findings verbatim. *Anderson v. City of Bessemer City*, 470 U.S. 564, 572, 105 S. Ct. 1504, 84 L. Ed. 2d 518 (1985).

To establish RICO liability, the government had to prove the necessary elements of RICO itself—including the existence of an enterprise and a pattern of racketeering activity, 18 U.S.C. § 1962(c)—as well as the elements of the underlying conduct constituting the racketeering acts, here, numerous instances of mail and wire fraud under 18 U.S.C. §§ 1341 and 1343. Defendants challenge the district court's findings regarding both RICO and the underlying fraud, as well as the remedies the court imposed. We address Defendants' challenges

to RICO liability in Part II, their general challenges to fraud liability in Part III, their challenges to specific aspects of the fraudulent scheme and the liability of specific Defendants in Part IV, their challenges to the finding that they are likely to commit future violations and therefore should be enjoined in Part V, and their challenges to particular remedies the court imposed in Part VI.

II. Challenges to RICO Liability

A. RICO Enterprise

RICO makes it unlawful for "any person . . . associated with any enterprise . . . to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity." 18 U.S.C. § 1962(c). Thus, in a section 1962(c) suit, the defendants are the "persons" who conduct the "enterprise's" affairs through racketeering activity. Because RICO defines "person" as including "any individual or entity capable of holding a legal or beneficial interest in property," *id.* § 1961(3), corporations as well as individuals can be liable if they conduct an enterprise's affairs through a pattern of racketeering activity. In language central to the issue before us, section 1961(4) states:

> "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.

Id. § 1961(4). The enterprise as such generally faces no section 1962(c) RICO liability; indeed it may be the innocent vehicle through which unlawful activity is carried out, *see Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 164, 121 S. Ct. 2087, 150 L. Ed. 2d 198 (2001)

("RICO both protects a legitimate 'enterprise' from those who would use unlawful acts to victimize it, and also protects the public from those who would unlawfully use an 'enterprise' (whether legitimate or illegitimate) as a 'vehicle' through which 'unlawful . . . activity is committed.'" (quoting *United States v. Turkette*, 452 U.S. 576, 591, 101 S. Ct. 2524, 69 L. Ed. 2d 246 (1981), and *Nat'l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 259, 114 S. Ct. 798, 127 L. Ed. 2d 99 (1994))). When the enterprise is an association-in-fact, members of the association may be both part of the "enterprise" and liable as "persons" under RICO if they conduct the enterprise's affairs through racketeering activity. *See, e.g., United States v. Richardson*, 167 F.3d 621, 626 (D.C. Cir. 1999) (upholding conviction of defendant member of association-in-fact enterprise).

Here, defining the RICO enterprise as "a group of business entities and individuals associated-in-fact, including Defendants to this action, their agents and employees, and other organizations and individuals," the district court held that the Defendant cigarette manufacturers and trade organizations had violated section 1962(c) by participating in the conduct of the enterprise's affairs through multiple acts of mail and wire fraud. *Philip Morris*, 449 F. Supp. 2d at 851, 867. Defendants challenge the district court's acceptance of a RICO enterprise made up of individuals and corporations, arguing that the statute provides an exclusive list of possible enterprises that covers groups of *individuals* associated in fact, not mixed groups of individuals *and corporations* associated in fact.

In *United States v. Perholtz*, 842 F.2d 343 (D.C. Cir. 1988), however, we squarely rejected this precise argu-

ment. There, we held that a group of seven individuals and eleven corporations and partnerships associated in fact may constitute a RICO "enterprise." *Id.* at 351 n.12, 353. We explained: "[RICO] defines 'enterprise' as *including* the various entities specified; the list of entities is not meant to be exhaustive." *Id.* at 353. As such, a group of individuals, corporations, and partnerships associated in fact can qualify as a RICO "enterprise," even though section 1961(4) nowhere expressly mentions this type of association.

In so holding, we joined several other circuits that had reached the same conclusion. *Perholtz*, 842 F.2d at 353 (citing the Second, Third, Seventh, and Eleventh Circuits, as well as Fifth Circuit Unit B). Indeed, both prior to and since *Perholtz*, every circuit to consider the question has likewise held that corporations may be part of an association-in-fact enterprise. *See United States v. London*, 66 F.3d 1227, 1243-44 (1st Cir. 1995) (holding that corporations can be part of an association-in-fact enterprise because section 1961(4)'s list is not exhaustive); *United States v. Huber*, 603 F.2d 387, 394 (2d Cir. 1979) (same); *United States v. Aimone*, 715 F.2d 822, 828 (3d Cir. 1983) (same); *United States v. Thevis*, 665 F.2d 616, 625-26 (5th Cir. Unit B 1982) (same), *superseded on other grounds by* FED. R. EVID. 804(b)(6) (1997); *United States v. Masters*, 924 F.2d 1362, 1366 (7th Cir. 1991) (same); *Atlas Pile Driving Co. v. DiCon Fin. Co.*, 886 F.2d 986, 995 n.7 (8th Cir. 1989) (same); *see also Dana Corp. v. Blue Cross & Blue Shield Mut. of N. Ohio*, 900 F.2d 882, 887 (6th Cir. 1990) (reaching same outcome and citing *Huber*, 603 F.2d at 393-94);*United States v. Navarro-Ordas*, 770 F.2d 959, 969 n.19 (11th Cir. 1985) (same); *United States v. Feldman*, 853 F.2d 648, 655-56 (9th Cir. 1988) (reaching

same outcome based on different statutory analysis); *United States v. Najjar*, 300 F.3d 466, 484 (4th Cir. 2002) (upholding without discussion RICO convictions involving an association-in-fact enterprise that included corporations). The judges of these circuits are equally unanimous, for not one has dissented from the proposition that an association-in-fact enterprise may include corporations.

Defendants argue that *Perholtz* has no applicability where, as here, the *defendants* are corporations. Because the *Perholtz* defendants were individual members of the enterprise, not its corporate members, Defendants here claim that *Perholtz* applies only when individuals, not corporations, are the RICO defendants. As Defendants see it, *Perholtz* merely ensures that individuals are unable to escape liability simply by including corporations in their enterprise; *Perholtz*, they argue, does not mean that the associated-in-fact corporations can themselves incur RICO liability.

But nothing in *Perholtz* is so limited. Quoting the Supreme Court's statement in *United States v. Turkette* that "[t]here is no restriction upon the associations embraced by the definition [of enterprise]," 452 U.S. at 580, 101 S. Ct. 2524, *Perholtz* sets forth its holding in broad terms: "We therefore follow those courts that have held that individuals, corporations, and other entities may constitute an association-in-fact," 842 F.2d at 353. Nowhere does *Perholtz* suggest that the rule varies depending on the identity of the defendants. Indeed, two of the cases *Perholtz* relies on involved corporate defendants. *Id.* (citing *Thevis*, 665 F.2d at 625-26 (upholding RICO convictions for one individual and one corporate defendant), and *Bunker Ramo Corp. v. United Bus.*

Forms, Inc., 713 F.2d 1272, 1285 (7th Cir. 1983) (upholding RICO charges against one individual and one corporation)). Many other decisions have similarly upheld RICO allegations involving corporate defendants who were also members of the association-in-fact enterprise. *See, e.g., City of N.Y. v. Smokes-Spirits.com, Inc.*, 541 F.3d 425, 450-51 (2d Cir. 2008); *Odom v. Microsoft Corp.*, 486 F.3d 541, 553 (9th Cir. 2007); *Najjar*, 300 F.3d at 484; *United States v. Goldin Indus., Inc.*, 219 F.3d 1271, 1274 (11th Cir. 2000); *Dana Corp.*, 900 F.2d at 887; *Shearin v. E.F. Hutton Group, Inc.*, 885 F.2d 1162, 1165-66 (3d Cir. 1989), *overruled on other grounds by Beck v. Prupis*, 529 U.S. 494, 506, 120 S. Ct. 1608, 146 L. Ed. 2d 561 (2000); *Atlas Pile Driving*, 886 F.2d at 995; *Ocean Energy II, Inc. v. Alexander & Alexander Inc.*, 868 F.2d 740, 748-49 (5th Cir. 1989).

Moreover, Defendants' proposed limitation on *Perholtz* is contrary to the statute's language. As "persons" under section 1961(3), corporations may be RICO defendants regardless of the kind of enterprise charged. *See* 18 U.S.C. § 1962(c) ("It shall be unlawful for *any* person . . . associated with *any* enterprise . . . to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity." (emphases added)). Defendants cite not a single case lending even a shred of support to the idea that the meaning of "enterprise" can fluctuate depending on whom the government or the plaintiff chooses to name as the defendant. *Perholtz*'s interpretation of section 1961(4) thus applies regardless of whether the RICO defendants are individual "persons" or corporate "persons." To hold otherwise would require us to rewrite section 1962(c).

In a further attempt to evade *Perholtz*, Defendants argue that even if *Perholtz* was correct when decided, it has been eroded by the Supreme Court's 2001 decision in *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 121 S. Ct. 2087, 150 L. Ed. 2d 198 (2001). Defendants' argument begins with the premise that at the time we decided *Perholtz*, RICO presented a potential loophole: because the RICO defendant must be distinct from the RICO enterprise, *Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union 639*, 839 F.2d 782, 790 (D.C. Cir. 1988) ("[O]ne entity may not serve as the enterprise and the person associated with it. . . . "), *vacated on other grounds*, 492 U.S. 914, 109 S. Ct. 3235, 106 L. Ed. 2d 583 (1989), a sole shareholder who used his alter-ego corporation for racketeering might evade RICO liability because he wouldn't be sufficiently distinct from the alter-ego corporation "enterprise." Defendants rely on *Perholtz*'s suggestion that a definition of "enterprise" that excluded associations-in-fact of corporations would lead to "the bizarre result that only criminals who failed to form corporate shells to aid their illicit schemes could be reached by RICO." 842 F.2d at 353. According to Defendants, we were motivated in *Perholtz* by the underlying concern "that a criminal defendant conducting the affairs of an 'enterprise' that was his own closely held corporation, would be so closely tied to the enterprise that he would escape RICO liability." Defs. Br. 37. Given that the Supreme Court has subsequently eliminated this concern— holding in *Cedric Kushner* that an individual sole shareholder *is* sufficiently distinct from his alter-ego corporation to sustain RICO liability, 533 U.S. at 160, 121 S. Ct. 2087—Defendants assert that *Perholtz* no longer represents binding authority.

We do not read *Perholtz* as motivated by the concerns addressed in *Cedric Kushner*. In contrast to *Cedric Kushner*, the enterprise in *Perholtz* involved multiple individuals and numerous corporations, with no indication that the corporations were either all closely held by the individual defendants or in any other way insufficiently distinct. 842 F.2d at 351 n.12. Indeed, at least some of the *Perholtz* corporate enterprise members were not closely held. For example, enterprise member International Business Services, Inc. (IBS) existed in its own right prior to the scheme and was related to the defendants through employment relationships that would not have defeated RICO's distinctness requirement: Perholtz himself was a consultant to IBS, and the other RICO defendant, Franklin Jackson, was an IBS project manager. *Id.* at 348. Similarly, enterprise member Remote Computer Services Corporation, although formed expressly for the purpose of the scheme, was jointly held in equal shares by three individuals—Perholtz and two other individual members of the enterprise, *id.* at 350—and thus would have been sufficiently distinct from each of those non-sole shareholders. The enterprise also included two separate real estate companies both of which apparently existed independently of the scheme and were not otherwise affiliated with the individuals. *Id.* at 351 n.12. At least one individual enterprise member, John Gentile, worked for the Postal Service and apparently had no formal stake in the corporate enterprise members. *Id.* at 346, 351 n.12. In *Perholtz*, we held that all these corporations—not just those closely held or created solely for the scheme—could be part of an association-in-fact enterprise. Indeed, only *after* so holding did we turn to Perholtz's entirely separate argument that he, as an individual, was insuffi-

ciently distinct from the enterprise. Far from basing our holding on this argument, we simply noted that we had "no occasion to consider the separateness requirement" because Perholtz associated not with himself but with others. *Id.* at 353.

Given the structure of the *Perholtz* enterprise and the court's acknowledgement that distinctness was not at issue, we think *Perholtz* reflected a different concern, namely that a group of sophisticated racketeers who would otherwise constitute an association-in-fact might evade RICO's grasp by virtue of their ability to operate through corporations and establish complex networks of companies, kickbacks, and contracts to achieve their illicit ends. Indeed, immediately following its reference to "corporate shells," *Perholtz* emphasized Congress's desire that RICO serve "as a weapon against the sophisticated racketeer as well as (and perhaps more than) the artless." *Id.* *Perholtz* itself presented just such a situation: the defendants worked through their own companies and multiple outside corporations in an intricate web of shared commissions to game the bidding process for government contracts. The success of the scheme required the participation of companies to serve as contractors and subcontractors. "This relationship of individuals and corporations is precisely what section 1962(c) was designed to attack." *Id.* at 354.

Moreover, in asserting their *Cedric Kushner* argument, Defendants fail to explain how *Perholtz*'s interpretation would even solve the hypothetical problem they posit. According to Defendants, in order to preserve RICO liability for a sole shareholder who would be insufficiently distinct from his alter-ego corporation, the *Perholtz* court held that an "individual and his shell cor-

poration could *together* . . . constitute an association-in-fact enterprise." Defs. Reply Br. 16. In Defendants' view, the sole shareholder would then be liable under RICO for conducting the affairs of this association-in-fact enterprise. Yet if an individual is insufficiently distinct from his alter-ego corporation, we seriously doubt he would suddenly be sufficiently distinct from an enterprise consisting of his alter-ego corporation *and himself*. If *Perholtz* had been concerned with distinctness, its purported "solution" would make little sense.

Further seeking to justify their reliance on *Cedric Kushner*, Defendants say that the government cites only one post-*Cedric Kushner* case—*United States v. Najjar*, 300 F.3d 466 (4th Cir. 2002)—that upheld an association-in-fact enterprise of corporations. The relevance of this is hard to grasp, as other post-*Cedric Kushner* cases *not* cited by the government accept association-in-fact enterprises comprised of corporations. *See Smokes-Spirits.com*, 541 F.3d at 450-51 (holding that the plaintiff adequately pleaded an association-in-fact enterprise consisting of two corporations); *Odom*, 486 F.3d at 553 (holding that plaintiffs had sufficiently alleged an association-in-fact enterprise of two corporations); *United States v. Cianci*, 378 F.3d 71, 83 (1st Cir. 2004) ("It is uncontroversial that corporate entities, including municipal and county ones, can be included within association-in-fact RICO enterprises."); *Living Designs, Inc. v. E.I. Dupont de Nemours & Co.*, 431 F.3d 353, 361 (9th Cir. 2005) ("[T]here is no question that DuPont [corporation] and the law firms together can constitute an 'associated in fact' RICO enterprise."). And as we noted above, no circuit has ever held the opposite.

Cedric Kushner thus undermines neither the unanimous judicial view that association-in-fact enterprises may include corporations nor *Perholtz*'s binding effect on this case. Defendants' argument that we should read section 1961(4) as an exhaustive list of possible RICO enterprises is therefore unavailing. Not only is it foreclosed by *Perholtz*, it is unpersuasive on its own terms. As *Perholtz* and many other circuits explain, the use of the word "includes" indicates that RICO's list of "enterprises" is non-exhaustive. Indeed, section 1961 makes the non-exhaustive nature of "includes" clear by alternating between the words "means" and "includes" to introduce the section's various definitions. Specifically, five of section 1961's ten subsections introduce definitions with the word "means." For example, section 1961(1) defines "racketeering activity," explaining that the term "means" any of a list of specific state and federal crimes. Section 1961(2) likewise introduces a definitional list with the term "means": "'State' means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof." 18 U.S.C. § 1961(2); *see also id.* § 1961(6), (7), (8) (introducing definitions of "unlawful debt," "racketeering investigator," and "racketeering investigation" with the term "means"). Section 1961(4), by contrast, says "'enterprise' *includes* any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." *Id.* § 1961(4) (emphasis added). By switching between "means" and "includes" in the same definitional provision, Congress signaled its intent to distinguish between exhaustive and non-exhaustive lists.

See Helvering v. Morgan's, Inc., 293 U.S. 121, 126 n.1, 55 S. Ct. 60, 79 L. Ed. 232 (1934) (describing a statute that introduced three definitions with the word "includes" and seven definitions with the word "means" and noting that "[t]he natural distinction would be that where 'means' is employed, the term and its definition are to be interchangeable equivalents, and that the verb 'includes' imports a general class, some of whose particular instances are those specified in the definition").

That Congress provided an exhaustive list of *legal* entity enterprises by adding the phrase "or other legal entity" hardly converts the list of *non*-legal entity enterprises into an exhaustive list. Had Congress wanted to limit non-legal entity associations to those expressly listed, the most obvious way to do so would have been the way Congress wrote the five clearly exhaustive definitions in the same section: it could have said " 'enterprise' *means* any individual, partnership, corporation, association, or other legal entity, or any union or group of individuals associated in fact although not a legal entity." But Congress chose to say " 'enterprise' *includes*" the listed entities. Defendants think that the phrase "or other legal entity" would have been unnecessary if the list were otherwise non-exhaustive. Not so. Adding "or other legal entity" serves to *ensure* that all legal entities are covered while retaining the *possibility* that some additional non-legal entities beyond those listed are also covered.

Nor does the use of the phrase "including, but not limited to" to indicate a non-exhaustive list in a different section of RICO, section 1964(a), demonstrate that the sole word "includes" in section 1961(4) must introduce an exhaustive list. Section 1964, which establishes civil

remedies for RICO violations, lacks section 1961's juxtaposition of the non-exhaustive term "includes" with the exhaustive term "means"; adding "but not limited to" helps to emphasize the non-exhaustive nature of section 1964(a)'s list of remedies. Section 1961 needed no such clarification because it employed the contrasting terms "means" and "includes" to distinguish exhaustive from non-exhaustive definitions.

Contrary to Defendants' argument, nothing about this interpretation renders the definition of "enterprise" devoid of meaning. Although encompassing non-enumerated enterprises, section 1961(4)'s list defines "enterprise," in part, by listing the *kinds* of entities Congress had in mind. Indeed, the Supreme Court has acknowledged this meaning by requiring enterprises to exhibit common purpose, organization, and continuity. *Turkette*, 452 U.S. at 583, 101 S. Ct. 2524; *see also Richardson*, 167 F.3d at 625.

In sum, as *Perholtz* clearly holds, because RICO's "list of entities is not meant to be exhaustive," "individuals, corporations, and other entities may constitute an association-in-fact." 842 F.2d at 353. This binding precedent—confirmed by the statute's language, buttressed by the unanimity among our sister circuits, and undiminished by Defendants' efforts to escape it—requires that we affirm the district court's holding that the government properly alleged a RICO enterprise of individuals, cigarette manufacturers, and trade organizations.

We also reject Defendants' additional challenges to the district court's findings regarding the existence of a RICO enterprise and their participation in its affairs. The district court found—permissibly in our view—that

the enterprise had the common purpose of obtaining cigarette proceeds by defrauding existing and potential smokers, *Philip Morris*, 449 F. Supp. 2d at 869; possessed the requisite structure both through informal association and through the formation of several formal organizations, *id.* at 870-71; functioned as a continuous unit despite personnel changes, *id.* at 871-72; and constituted a separate entity distinct from each Defendant, *id.* at 875. Defendants give us neither any basis for concluding that the district court's factual findings were clearly erroneous nor any reason to think them legally insufficient. The district court also found—again permissibly—that despite competing in some aspects of their business, Defendants jointly committed fraud and so participated in the conduct of not just their own affairs but the enterprise's as well, *id.* at 875-78, and also that they conspired to do so, *id.* at 903-05. Accordingly, we affirm the district court's findings that an enterprise existed and that Defendants participated in the conduct of its affairs and conspired to do so.

B. Identifying Racketeering Acts

Defendants complain that the district court failed to identify the racketeering acts that support the finding of liability. While it is true the district court's opinion provided no single, discrete list of specific racketeering acts, the comprehensive findings—detailing over one-hundred racketeering acts—are sufficient to warrant affirmance. Defendants raise numerous challenges to the *correctness* of the district court's findings that they committed racketeering acts, which we take up in Parts III and IV. In this section, however, we are concerned only with the *existence* of these findings, not their validity.

By statutory definition, any violation of the mail or wire fraud statutes can qualify as "racketeering activity." 18 U.S.C. § 1961(1). To prove a violation of the mail and wire fraud statutes, the government must show (1) a scheme or artifice to defraud and (2) a mailing or wire transmission in furtherance thereof. *Id.* §§ 1341, 1343. "Where one scheme involves several mailings, the law is settled that each mailing constitutes a violation of the statute." *Hanrahan v. United States*, 348 F.2d 363, 366 (D.C. Cir. 1965). Where, as here, the mail and wire fraud statutes serve as the predicate offenses for a RICO violation, each racketeering act must be a mailing or wire transmission made in furtherance of a "scheme or artifice to defraud." 18 U.S.C. §§ 1341, 1343. Thus, in order to identify the racketeering acts, the district court must first have found a scheme to defraud, then concluded the alleged mailings or wire transmissions were in furtherance of such scheme. *See Philip Morris*, 449 F. Supp. 2d at 852-54.

Although Defendants question whether the district court clearly found a scheme to defraud, the finding on this question is explicit: "The Government has proven that the Enterprise knowingly and intentionally engaged in a scheme to defraud smokers and potential smokers, for purposes of financial gain, by making false and fraudulent statements, representations, and promises." *Id.* at 852. The district court explains, in great detail, the seven components of the scheme to defraud. *Id.* at 852-67.

The court also held that "each of the alleged mailings and wire transmissions was in furtherance of the overarching scheme to defraud." *Id.* at 881. Thus it follows that any mailing or wire transmission found to have

been made was found to have been a mail or wire fraud offense and therefore a racketeering act.

Seventy-nine of the alleged acts were established by Defendants' own stipulations and admissions. *Id.* at 882 (enumerating 79 racketeering acts). Altogether, the court enumerated 108 racketeering acts in the opinion, as well as six others which it excluded on First Amendment grounds. *See id.* at 882, 884, 885 n.62, 887. This total does not include the many other findings which may be tied to other racketeering acts, but for which the district court did not provide a specific list. *See, e.g., id.* at 883 ("[I]t is clear beyond any question that Defendants caused the mailings and wire transmissions underlying the 30 Racketeering Acts involving the news media's dissemination of Defendants' press releases and advertisements to their subscribers.").

The RICO statute requires "a pattern of racketeering activity" on the part of each defendant. 18 U.S.C. § 1962(c). "[A]t least two acts of racketeering activity" are necessary to form a pattern. *H.J., Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 237, 109 S. Ct. 2893, 106 L. Ed. 2d 195 (1989) (quoting 18 U.S.C. § 1961(5)). The district court found the requisite pattern committed by each Defendant, *Philip Morris*, 449 F. Supp. 2d at 889-91, and this finding is not erroneous. A brief sampling of the 108 enumerated racketeering acts makes the point: Philip Morris, Reynolds, Brown & Williamson, Lorillard, American, and TI committed racketeering acts 24, 132, and 133 by mailing press releases containing false statements about the addictiveness and health consequences of smoking. *Id.* at 194, 282-83. Philip Morris, Reynolds, Brown & Williamson, Lorillard, American, Liggett, and CTR committed racketeering acts 66, 73, and 88 by mail-

ing letters regarding funding of CTR's "special projects" to create data supporting their fraudulent claims. *Id.* at 101, 882, 972, 976. BATCo and Brown & Williamson committed racketeering acts 30, 50, 51, 53, and 63 through their mailings to each other concerning the enterprise's position on the health effects and addictiveness of smoking as well as smoker compensation and nicotine. *Id.* at 253-54, 301, 882, 965, 969. Altria committed racketeering acts 71, 72, 74, and 75 in its efforts to coordinate Defendants' public positions and fund CTR research projects to support their fraudulent claims. *Id.* at 295, 813, 884, 974. As these examples demonstrate, the district court found each Defendant engaged in a "pattern of racketeering activity," and that finding is not erroneous. *See infra* Parts III, IV.

The 108 enumerated acts give us ample basis to review the district court's finding. Although the district court may have concluded other racketeering acts were proven as well, we need look no further. Defendants correctly argue we must ensure the remedy imposed is tailored to "the violation found," *United States v. Microsoft*, 253 F.3d 34, 105 (D.C. Cir. 2001); the voluminous findings detailing the contours of the scheme to defraud are more than sufficient to allow this review, *see, e.g.*, *Philip Morris*, 449 F. Supp. 2d at 852-67. Given that a mailing or wire transmission need not itself be fraudulent, the remedy needs to be tailored to the scheme to defraud, not the specific use of the mail or wires.

For similar reasons, we need not resolve Defendants' challenges to the racketeering acts involving denials of marketing to youth. As the district court imposed no remedies specifically relating to youth marketing, our assessment whether the remedies are tailored to the

violation found is unaffected by the associated racketeering acts. The remaining racketeering acts are fully sufficient to support the district court's finding of a pattern of racketeering activity as to each Defendant. Because these challenges have no impact on the outcome of this appeal, we decline to address them. The district court set forth findings sufficient to allow our review of its verdict of liability and imposition of sanction.

III. General Challenges to Fraud Liability

A. Specific Intent

The predicate acts of racketeering in this case were all acts of mail or wire fraud, which require specific intent to defraud. *Post v. United States*, 407 F.2d 319, 329 (D.C. Cir. 1968). Defendants challenge the district court's conclusion that they acted with specific intent, arguing that the district court applied an impermissible "collective intent" standard and that the government did not present any evidence to support a finding of specific intent under the correct formulation.

Corporations may be held liable for specific intent offenses based on the "knowledge and intent" of their employees. *N.Y. Cent. & Hudson River R.R. Co. v. United States*, 212 U.S. 481, 495, 29 S. Ct. 304, 53 L. Ed. 613 (1909); *see United States v. A & P Trucking Co.*, 358 U.S. 121, 125, 79 S. Ct. 203, 3 L. Ed. 2d 165 (1958). Because a corporation only acts and wills by virtue of its employees, the proscribed corporate intent depends on the wrongful intent of specific employees. *See Saba v. Compagnie Nationale Air France*, 78 F.3d 664, 670 (D.C. Cir. 1996). Thus, to determine whether a corporation made a false or misleading statement with specific intent to defraud, we look to the state of mind of the in-

dividual corporate officers and employees who made, ordered, or approved the statement. *Southland Sec. Corp. v. INSpire Ins. Solutions Inc.*, 365 F.3d 353, 366 (5th Cir. 2004).

A person's state of mind is rarely susceptible of proof by direct evidence, so specific intent to defraud may be, and most often is, inferred from the totality of the circumstances, including indirect and circumstantial evidence. *United States v. Alston*, 609 F.2d 531, 538 (D.C. Cir. 1979); *United States v. Reid*, 533 F.2d 1255, 1264 (D.C. Cir. 1976). We refer to this inference when, in the common law fraud context, we say that the factfinder "is permitted to impute knowledge of the falsity of the statements to the accused, not as a matter of law but as a consequence of inferences reasonably drawn from the facts shown." *United States v. Avant*, 275 F.2d 650, 653 (D.C. Cir. 1960).

Here, the district court concluded that the chief executive officers and other highly placed officials in the Defendant corporations made or approved statements they knew to be false or misleading, evincing their specific intent to defraud consumers. In some instances, the court found by direct evidence that representatives of the Defendant companies "willfully stat[ed] something which they knew to be untrue." *Philip Morris*, 449 F. Supp. 2d at 895. For example, the court found that, in a televised interview in 1971, Philip Morris President Joseph Cullman III denied that cigarettes posed a health hazard to pregnant women or their infants, "contradict[ing] the information Helmut Wakeham, Philip Morris's Vice President for Corporate Research and Development, had given him two years earlier." *Id.* at 193-94. In the main, however, the district court relied

on indirect and circumstantial evidence indicating that the senior corporate officials knew that their public statements, and those that they approved for their corporations, were false or misleading.

> In the majority of instances, the authors of the fraudulent statements alleged as Racketeering Acts were executives, including high level scientists—CEOs, Vice Presidents, Heads of Research & Development, not entry level employees—at each of the Defendant companies who would reasonably be expected to have knowledge of the company's internal research, public positions, and long term strategies.

Id. at 897. The court reasoned:

> [I]t is absurd to believe that the highly-ranked representatives and agents of these corporations and entities had no knowledge that their public statements were false and fraudulent. The Findings of Fact are replete with examples of C.E.O.s, Vice-Presidents, and Directors of Research and Development, as well as the Defendants' lawyers, making statements which were inconsistent with the internal knowledge and practice of the corporation itself.

Id. at 853. The district court did not commit legal error by imputing to Defendants' executives knowledge of the falsity of their statements based on inferences reasonably drawn from the facts shown, and sufficient evidence supported these inferences.

The government presented decades of evidence that scientists within the Defendant corporations and outside scientists hired by the corporations and their joint entities were continually conducting research and reviewing the research of other scientists regarding cigarettes and

health, addiction, nicotine and tar manipulation, and secondhand smoke. The evidence at trial demonstrated that the results of this research—essential to the core of Defendants' operations, including strategic planning, product development, and advertising—were well known, acknowledged, and accepted throughout the corporations. These results established that cigarette smoking causes disease, that nicotine is addictive, that light cigarettes do not present lower health risks than regular cigarettes due to smoker compensation, and that secondhand smoke is hazardous to health. Dr. William Farone, a scientist who worked at Philip Morris for eighteen years and whom the district court found to be "impressive and credible as both a fact and expert witness," *id.* at 186, testified about the understanding within Philip Morris on the question of whether cigarette smoking is a cause of lung cancer and other diseases:

> There was widespread acceptance that smoking caused disease. I never talked with a scientist at Philip Morris who said that smoking doesn't cause disease. [This was based on the] compelling epidemiology such as that recounted in the Surgeon's [sic] General's reports, and our knowledge about the chemicals that were created by cigarettes and what was delivered to the smoker, hundreds of times per day on average.

Id. at 187 (quoting Farone testimony). When asked whether, in his discussions with Philip Morris executives, any of them challenged the validity of the scientific evidence that smoking causes disease, Farone answered,

> No. Their comments generally focused on how the company could or should respond, not to whether the scientific evidence was valid. Remember, a main reason why they hired me in 1976 was to help develop a less hazardous cigarette. It seemed to me at the time I was hired, and certainly was the case during my entire time there, that hiring me for that job was itself implicit recognition that the cigarettes that were out there being sold were causing disease.

Id. (quoting Farone testimony).

The Defendant corporations documented the results of the studies regarding disease, nicotine addiction, and smoker compensation in numerous memoranda and reports; the evidence at trial, including internal corporate documents, demonstrated that the executives crafted their corporate priorities and strategies in response to these findings. *See, e.g., id.* at 165, 180, 218, 219, 232, 240, 258-59, 270, 336, 720. Defendants' own documents also support the inference that Defendants' executives were aware that their public relations strategy of creating the impression of an "open question" about the link between smoking and disease did not square with their own knowledge about the established link between the two. For example, William Kloepfer, Vice President of Public Relations for the Tobacco Institute, wrote to Earle Clements, President of the Tobacco Institute, admitting that "[o]ur basic position in the cigarette controversy is subject to the charge, and may be subject to a finding, that we are making false or misleading statements to promote the sale of cigarettes." *Id.* at 855. Other documents demonstrate that Defendants' top officials were directly informed of negative research results. For example, in 1977 Philip Morris Assistant Gen-

eral Counsel Alexander Holtzman sent a "warning" to the company's President, Joseph Cullman, informing him that a research project jointly sponsored by a group of the Defendant companies had concluded that exposure to cigarette smoke causes emphysema. *Id.* at 183.

The government presented similar evidence regarding the other aspects of Defendants' scheme, such as addiction and nicotine. A few examples cannot adequately present the volumes of evidence underlying the district court's findings of fact, but the following provide a fair sample: A 1991 Reynolds Research and Development report acknowledged that "[w]e are basically in the nicotine business." *Id.* at 237. Dr. Farone testified that during his time at Philip Morris there was "widespread acceptance internally throughout the company—among executives, scientists, and marketing people" that nicotine was primarily responsible for addiction to smoking. *Id.* at 858. Indeed, the district court found that "internal documents and testimony from former company employees affirmed that within their corporate walls, Defendants openly recognized the addictiveness of cigarettes." *Id.* Regarding light cigarettes, internal research reports and memoranda at the Defendant companies revealed that they understood the phenomenon of smoker compensation and studied how to manipulate it in order to make their light brands appealing to addicted smokers while continuing to be able to advertise the brands as low tar. For example, a 1978 BATCo memorandum about that company's internal research acknowledged that "a majority of habitual smokers compensate for changed delivery" and explained that if smokers "choose [a] lower delivery brand . . . than their usual brand" they "will in fact increase

the amounts of tar and gas phase that they take in, in order to take in the same amount of nicotine." *Id.* at 861. Dr. Farone testified that Defendants' superior knowledge of compensation (compared to that of scientists outside the industry, including the government) was closely held within Philip Morris and the tobacco industry and there was an "effort on the part of [his] coworkers at Philip Morris, including [his] supervisors, to restrict any public acknowledgment on the part of Philip Morris of the phenomena of compensation." *Id.*

As these examples and hundreds more findings in the district court's opinion demonstrate, the court had before it sufficient evidence from which to conclude that Defendants' executives, who directed the activities of the Defendant corporations and their joint entities, knew about the negative health consequences of smoking, the addictiveness and manipulation of nicotine, the harmfulness of secondhand smoke, and the concept of smoker compensation, which makes light cigarettes no less harmful than regular cigarettes and possibly more. The government presented evidence indicating that specific high-ranking corporate officials were directly informed about these matters, as well as evidence of pervasive knowledge and acceptance of these propositions throughout the Defendant organizations. The overwhelming indirect and circumstantial evidence was sufficient to allow the district court to reasonably infer that the high level executives, including "CEOs, Vice Presidents, [and] Heads of Research & Development" for Defendants knew about their respective companies' "internal research, public positions, and long term strategies," *id.* at 897, that is, the "internal knowledge and practice" of the company, *id.* at 853. These executives then made, caused to be made, and approved public statements con-

trary to this knowledge. *See, e.g., id.* at 190 (Philip Morris Vice President and General Counsel declaring "[n]obody has yet been able to find any ingredient as found in tobacco or smoke that causes human disease"); *id.* at 166, 201 (28 years after Reynolds scientists declared the presence of carcinogenic compounds in cigarettes was "now well established," a Reynolds press release and newspaper advertisement declared the connection between smoking and disease "an open controversy"); *id.* at 772 (TI published booklet declaring that secondhand smoke had not been shown to be a health hazard to nonsmokers); *id.* at 796 (Lorillard general counsel testified at trial that the company's public position has always been and continues to be that secondhand smoke is not a proven health hazard); *id.* at 273 (President and CEO of Philip Morris quoted in TIME magazine from deposition testimony claiming that cigarettes are not addictive unless a similar attachment to Gummi Bears is an addiction); *id.* at 285 (TI's Vice President for Public Affairs on television programs flatly denying that nicotine is addictive, stating the attachment is like being a "news junkie" or "chocoholic").

Specific intent to defraud may be inferred where, as here, there is a pattern of corporate research revealing a particular proposition, for example, that smoking is addictive; an ensuing pattern of memoranda within the corporation acknowledging that smoking is addictive, even though the memoranda may or may not have gone directly to the executive who makes the contrary statement; and the corporate CEO or other official of high corporate status then makes a public statement stating that smoking is not addictive, contrary to the knowledge within the corporation. Based on this sort of evidence and the inferences reasonably drawn from it, a factfind-

er could permissibly infer that the speaker harbored specific intent to defraud at the time he or she made the false or misleading statement. Moreover, such pervasive knowledge throughout the organizations demonstrates that Defendants' executives at least acted with reckless disregard for the truth or falsity of their statements. As the district court correctly held, such reckless disregard suffices to demonstrate the requisite intent. *Id.* at 897. The law then imputes this specific intent to the corporation.

Defendants argue that, even if the previous discussion presents a correct statement of the law, it is not the standard that the district court applied here. Rather, Defendants assert that the district court relied on an impermissible "collective intent" theory to find specific intent based on public statements contradicting the "collective knowledge" of the Defendant corporations without finding that any employee harbored specific intent to defraud. Like Defendants and other courts, we are dubious of the legal soundness of the "collective intent" theory. *Saba*, 78 F.3d at 670 n.6 ("corporate knowledge of certain facts [can be] accumulated from the knowledge of various individuals, but the proscribed intent (willfulness) depend[s] on the wrongful intent of specific employees"); *see, e.g., Southland Sec. Corp.*, 365 F.3d at 366; *Nordstrom, Inc. v. Chubb & Son, Inc.*, 54 F.3d 1424, 1435 (9th Cir. 1995); *United States v. Bank of New Eng., N.A.*, 821 F.2d 844, 855 (1st Cir. 1987); *Woodmont, Inc. v. Daniels*, 274 F.2d 132, 137 (10th Cir. 1960); *First Equity Corp. v. Standard & Poor's Corp.*, 690 F. Supp. 256, 260 (S.D. N.Y. 1988). We need not pass on the merits of such a standard here, however, because the district court relied on a permissible view of specific intent. Although at times the court articulated a "collective in-

tent" standard, *see Philip Morris*, 449 F. Supp. 2d at 895-97, it also based its holding on a proper view of specific intent, *see id.* at 853, 897, and we are satisfied that the court's conclusions based on the proper standard are sufficient to uphold its judgment.

B. Materiality

In their next general challenge to fraud liability, Defendants argue that their false and misleading statements about the health effects of smoking cannot, as a legal matter, be fraudulent because their statements were not material. This argument is based on a flawed understanding of the materiality requirement.

In order for a false or misleading statement to qualify as mail or wire fraud, it "must concern a material or important fact or matter." *United States v. Winstead*, 74 F.3d 1313, 1320 (D.C. Cir. 1996). This materiality requirement is met if the matter at issue is "of importance to a reasonable person in making a decision about a particular matter or transaction." *Id.* Materiality does not require proof that any specific person (or number of people) purchased cigarettes as a result of the false statements. Nor does it require Defendants' false statements to be the cause, reason, or sufficient condition of any person's decision to purchase cigarettes. Moreover, no subjective evidence regarding any particular person is required; the test is only whether a reasonable person would consider the matter to be of importance regarding the transaction.

The false statements identified by the district court would be important to a reasonable person purchasing cigarettes. For example, statements about the adverse health effects of smoking, *see Philip Morris*,

449 F. Supp. 2d at 146-208, would be a matter of importance to a reasonable person deciding to purchase cigarettes. The fact that Defendants continually denied any link between smoking and cancer, *see, e.g., id.* at 204, suggests they themselves considered the matter material. So, too, regarding Defendants' false statements on other topics, including statements concerning: whether smoking is addictive, *id.* at 208-308, whether Defendants manipulated their cigarettes to control nicotine delivery, *id.* at 308-84, whether "light" cigarettes were less harmful than other cigarettes, *id.* at 430-561, whether secondhand smoke is hazardous to non-smokers, *id.* at 692-801, and whether Defendants concealed scientific research and destroyed documents, *id.* at 801-39.

Each of these topics is an important consideration for a reasonable person because each concerns direct and significant consequences of smoking. When deciding whether to smoke cigarettes, tobacco consumers must resolve initial reservations (or lingering qualms) about the potential for cancer, the risk of addiction, or the hazardous effects of secondhand smoke for friends, family, and others who may be exposed. Defendants' prevarications about each of these issues suggests full awareness of this obvious fact; reasonable purchasers of cigarettes would consider these statements important.

Defendants further argue that, because the scientific community had reached a consensus regarding the severely adverse health consequences of smoking, their statements to the contrary would not be believed. *See* Defs. Br. 98 (arguing that "the public was aware of smoking's adverse health consequences and thus any inconsistent assertion by defendants could not be material to a reasonable person"). The question, however, is not

whether a reasonable person would have believed Defendants' false statements, but only whether a reasonable person would have considered the issue "of importance," and the issues considered by the district court clearly met the materiality threshold.

C. First Amendment

In their final general challenge to fraud liability, Defendants claim at least a portion of their statements qualify as protected activity under the First Amendment. Of course, it is well settled that the First Amendment does not protect fraud. *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357, 115 S. Ct. 1511, 131 L. Ed. 2d 426 (1995) (stating that the government "may, and does, punish fraud directly"). Recognizing this fact, Defendants argue their statements were not fraudulent, but those arguments are discussed and rejected elsewhere in this opinion. *See supra* Part III.A-B; *infra* Part IV.

Defendants next claim protection under the *Noerr-Pennington* doctrine—a doctrine, rooted in the Petition Clause of the First Amendment, that protects "an attempt to persuade the legislature or the executive to take particular action with respect to a law. . . ." *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 136, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961). The protection does not "cover activity that was not genuinely intended to influence government action." *Allied Tube & Conduit Corp. v. Indian Head*, 486 U.S. 492, 508 n.10, 108 S. Ct. 1931, 100 L. Ed. 2d 497 (1988).

Defendants' attempt to invoke *Noerr-Pennington* as protection fails because the doctrine does not protect deliberately false or misleading statements. "[N]either the

Noerr-Pennington doctrine nor the First Amendment more generally protects petitions predicated on fraud or deliberate misrepresentation." *Edmondson & Gallagher v. Alban Towers Tenants Ass'n*, 48 F.3d 1260, 1267 (D.C. Cir. 1995) (describing the holding in *Whelan v. Abell*, 48 F.3d 1247 (D.C. Cir. 1995)); *see also McDonald v. Smith*, 472 U.S. 479, 485, 105 S. Ct. 2787, 86 L. Ed. 2d 384 (1985) (finding the Petition Clause does not have "special First Amendment status" and that petitions are not entitled to "greater constitutional protection" than "other First Amendment expressions"); *Whelan*, 48 F.3d at 1255 ("However broad the First Amendment right to petition may be, it cannot be stretched to cover petitions based on known falsehoods."). The district court's valid findings of fraud in this case take Defendants' statements out of the *Noerr-Pennington* context because they were clearly and deliberately false. The district court provided countless examples of deliberately false statements by Defendants: "Cigarette smoking causes disease, suffering, and death. Despite internal recognition of this fact, Defendants have publicly denied, distorted, and minimized the hazards of smoking for decades," *Philip Morris*, 449 F. Supp. 2d at 146; "Defendants have researched and recognized, decades before the scientific community did, that nicotine is an addictive drug. . . . Notwithstanding the understanding and acceptance of each Defendant that smoking and nicotine are addictive, Defendants have publicly denied and distorted the truth as to the addictive nature of their products for several decades," *id.* at 208-09; "Defendants have designed their cigarettes to precisely control nicotine delivery levels and provide doses of nicotine sufficient to create and sustain addiction. At the same time, Defendants have concealed much of their nicotine-

related research, and have continuously and vigorously denied their efforts to control nicotine levels and delivery," *id.* at 309; "Defendants have known for decades that filtered and low tar cigarettes do not offer a meaningful reduction of risk, and that their marketing which emphasized reductions in tar and nicotine was false and misleading," *id.* at 860; "Despite their internal acknowledgment of the hazards of secondhand smoke, Defendants have fraudulently denied that [secondhand smoke] causes disease," *id.* at 864.

Were these statements false, but not deliberately so, Defendants would have a better argument. But Defendants knew of their falsity at the time and made the statements with the intent to deceive. Thus, we are not dealing with accidental falsehoods, or sincere attempts to persuade; Defendants' liability rests on deceits perpetrated with knowledge of their falsity. Where statements are deliberately false or misleading, *Noerr-Pennington* does not apply. *See Alban Towers*, 48 F.3d at 1267. Indeed, if Defendants' statements had not been made with fraudulent intent, there would be no basis for RICO liability in the first place.

The district court found six alleged acts protected by *Noerr-Pennington* and based its holding on the remaining racketeering activity. *Philip Morris*, 449 F. Supp. 2d at 887. All six excluded acts were instances of testimony to Congress and, given the wealth of unprotected racketeering acts, we need not reach the question whether the district court correctly excluded these acts. The remaining acts were intended to defraud consumers, so *Noerr-Pennington* protection does not apply.

IV. Specific Challenges to Fraud Liability

A. "Light" Cigarettes

The first specific fraud finding Defendants challenge relates to their marketing of "light" cigarettes. The district court found: "As their internal documents reveal, Defendants engaged in massive, sustained, and highly sophisticated marketing and promotional campaigns to portray their light brands as less harmful than regular cigarettes." *Philip Morris*, 449 F. Supp. 2d at 860. The court concluded "Defendants have known for decades that filtered and low tar cigarettes do not offer a meaningful reduction of risk, and that their marketing which emphasized reductions in tar and nicotine was false and misleading." *Id.*

Defendants contend they should be immune from liability because the Federal Trade Commission ("FTC") has blessed their use of labels such as "light" and "low tar." This argument is entirely foreclosed by the Supreme Court's recent decision in *Altria v. Good*, — U.S. —, 129 S. Ct. 538, 172 L. Ed. 2d 398 (2008), concluding the FTC has never condoned the use of "light" or "low tar" descriptors. *Id.* at 550. Defendants point to a 1966 industry guidance letter from the FTC stating that "a factual statement of the tar and nicotine content (expressed in milligrams) of the mainstream smoke from a cigarette," as measured by the Cambridge Filter Method, was permissible under the FTC Act. *Id.* at 549. The "Commission made clear, however, that the guidance applied only to factual assertions of tar and nicotine yields and did not invite any 'collateral representations . . . made, expressly or by implication, as to reduction or elimination of health hazards.'" *Id.*

Despite Defendants' argument to the contrary, "the FTC has in fact never required that cigarette manufacturers disclose tar and nicotine yields, nor has it condoned representations of those yields through the use of 'light' or 'low tar' descriptors." *Id.* at 550. Although the FTC never prevented Defendants from using misleading descriptors, "agency nonenforcement of a federal statute is not the same as a policy of approval." *Id.* As the Supreme Court held, "neither the handful of industry guidances and consent orders on which petitioners rely nor the FTC's inaction with regard to 'light' descriptors even arguably justifies the pre-emption" argument advanced by Defendants. *Id.* at 551. For the same reasons, these actions fail to constitute FTC authorization of the descriptors that could defeat a finding of specific intent to defraud.

It is also worth noting that the district court in this case did not find liability solely based on the use of descriptors such as "light" and "low tar." The court found Defendants orchestrated "highly sophisticated marketing and promotional campaigns to portray their light brands as less harmful than regular cigarettes." *Philip Morris*, 449 F. Supp. 2d at 860. In addition to the misleading use of descriptors, the district court found "[Defendants'] public statements are blatantly false" in relation to the marketing of "light" cigarettes. *Id.* at 861. The district court went on to find that "[a]s part of the Enterprise's scheme to defraud smokers, Defendants withheld and suppressed their extensive knowledge and understanding of nicotine-driven smoker compensation." *Id.* These findings reveal that fraudulent activity surrounding "light" cigarettes was not merely limited to the use of misleading descriptors. In addition to the fact that the descriptors were not authorized by the FTC,

the district court relied on other fraudulent activity by Defendants.

Independent of their FTC-authorization argument, Defendants also insist terms such as "light cigarettes" are not misleading to the public. They analogize "light" cigarettes to sodas which are "low caffeine" and cookies which are "low fat." According to Defendants, the public knows that drinking many "low caffeine" sodas can result in higher levels of caffeine consumption, and eating many "low fat" cookies can result in higher levels of fat consumption. Defendants thus analogize to "light" cigarettes, maintaining that it is obvious that smoking many "light" cigarettes can result in higher levels of nicotine and tar consumption. But the analogy to "light cigarettes" is inapt. Unlike drinking sodas and eating cookies, the factors behind compensation in "light" cigarettes are largely subconscious: "the smoker will subconsciously adjust his puff volume and frequency, and smoking frequency, so as to obtain and maintain his per hour and per day requirement for nicotine." *Philip Morris*, 449 F. Supp. 2d at 467 (citing internal tobacco company documents). Not only is smoker compensation subconscious, but factors such as puff volume and frequency are not even tied to the number of "light" cigarettes smoked. The analogy to sodas and cookies fails; the subconscious nature of smoker compensation enabled Defendants to mislead the public about the health effects of "light" cigarettes.

Finally, Defendants argue their descriptors were simply verbal representations of numerical ratings authorized by the FTC, and thus were literally true. Even leaving aside the fact that literally true statements may nevertheless constitute fraud, this claim founders on the

district court's finding that "there are lights of certain brands with higher tar levels than regulars of other brands from the same company, and there are also lights and regulars of the same brands that have the same FTC tar rating." *Id.* at 861. This finding, which Defendants do not attempt to show is clearly erroneous, reveals the descriptors were not simply representations of numerical ratings and thus were not "literally true."

B. Secondhand Smoke

We turn next to Defendants' claim that the district court erred in finding that they fraudulently denied the adverse health effects of secondhand smoke. Federal Rule of Civil Procedure 52 obliges us to uphold the district court's findings of fact unless they are "clearly erroneous." FED. R. CIV. P. 52(a)(6). Under this highly deferential standard, we may disturb the district court's findings only if we are "left with the definite and firm conviction that a mistake has been committed." *E.g.*, *Boca Investerings P'ship v. United States*, 314 F.3d 625, 630 (D.C. Cir. 2003) (quotation marks omitted). This is so even if we "would have decided the case differently," as "[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Anderson*, 470 U.S. at 574, 105 S. Ct. 1504.

Defendants contend that their statements disputing the health hazards of secondhand smoke were merely good-faith expressions of opinion. But the district court found to the contrary—that Defendants' representations were fraudulent and not in good faith. *Philip Morris*, 449 F. Supp. 2d at 853, 864-65. Under Rule 52, then, the

question for us is whether this finding was clearly erroneous.

The district court criticized Defendants' statements regarding secondhand smoke as contrary to the scientific consensus. Defendants object, emphasizing that the district court found no scientific consensus emerged until the issuance of the Surgeon General's 1986 report determining secondhand smoke to be hazardous. Moreover, they point to evidence of selected post-1986 scientific opinions casting doubt on the dangers of secondhand smoke, arguing that even then they possessed some basis for disputing the consensus.

Defendants' objections are beside the point. The district court based its finding of fraudulent intent not just on the existence of a consensus but also on evidence of Defendants' own knowledge. *Philip Morris*, 449 F. Supp. 2d at 864-65. Specifically, the district court found that dating back to the 1970s, Defendants' own research and analysis revealed the hazards of secondhand smoke. For example, the district court found that in 1980 a Philip Morris scientist reviewed a paper concluding that secondhand smoke caused "significant damage to airway function" in exposed nonsmokers, and found "little to criticize," deeming the paper "an excellent piece of work which could be very damaging" to the industry. *Id.* at 709 (quotation marks omitted). In 1982, a Philip Morris-sponsored research facility concluded that the "side stream" smoke composing the bulk of secondhand smoke is "more irritating and/or toxic" than the "main stream" smoke inhaled by smokers. *Id.* at 710 (quotation marks omitted). And several TI advertisements and press releases claimed that an independent 1981 study showing "a significant correlation between lung cancer and sec-

ondhand smoke" suffered from a statistical flaw, *id.* at 715, yet the district court found that industry consultants told TI, Reynolds, and Brown & Williamson that TI knew at the time not only that the statistical error did not exist, but also that the study was in fact correct. *Id.* at 717-18.

In addition to these and other findings providing relatively direct evidence that Defendants were aware of the health risks of secondhand smoke, the district court found that Defendants concealed their role in making statements regarding secondhand smoke. While it may be true that purveyors of consumer products, without fraudulent intent, frequently engage in concealed support of positive research in their industries, the concealment of identity by Defendants over so long a period on a subject of such intense controversy is at the very least consistent with knowledge of the falsity of their statements.

Although Defendants insist they had no knowledge of the misleading character of their public statements, they nowhere challenge the accuracy of these or any of the district court's other findings suggestive of their knowledge. Instead, they argue that such findings reveal only facts that were known to the public and that had not, at the time, given rise to a scientific consensus. Again Defendants miss the point. The question is not whether *other* individuals knew that Defendants' claims were false or misleading; the question is whether *Defendants* did. Regardless of whether a scientific consensus existed at any point, Defendants may be liable for fraud if they made statements knowing they were false or misleading. Based on voluminous evidence, including that summarized above, the district court circumstantially

inferred that Defendants did in fact possess such fraudulent intent. Given these unchallenged findings, we have no basis for saying that the district court clearly erred in drawing that conclusion.

C. Addiction

Defendants also claim that the district court clearly erred in finding their representations disputing the addictiveness of cigarettes to be intentionally misleading. We analyze the district court's factual finding as to the misleading character of Defendants' commercial statements for clear error. *E.g., FTC v. Brown & Williamson Tobacco Corp.*, 778 F.2d 35, 41-42 & n.3 (D.C. Cir. 1985). We find none.

Defendants claim that their statements regarding addiction were not intentionally misleading because the term "addiction" is ambiguous. Pointing to the district court's findings that the meaning of the term "addiction" in the scientific community changed over time, Defendants insist that their statements merely clung to the earlier, narrower, definitions of the term, and claim that the district court erroneously converted a semantic dispute into a fraud case. But the district court did not find only that Defendants insisted on retaining an earlier definition of addiction. It found that they did so as part of a concerted effort to misrepresent the difficulty of quitting smoking. *Philip Morris*, 449 F. Supp. 2d at 208-09, 308, 857-59. Defendants fail to demonstrate that this finding was clearly erroneous.

To begin with, Defendants never challenge the district court's findings documenting the impact of nicotine on the body and, more importantly, Defendants' understanding of its effects. *Id.* at 209-11, 216-71. As early as

1963, Brown & Williamson's general counsel wrote a confidential memorandum stating: "We are, then, in the business of selling nicotine, an addictive drug effective in the release of stress mechanisms." *Id.* at 259 (quotation marks omitted). Further, the district court found that Defendants were aware that cigarette dependence was stronger than mere habit formation. In 1974, a Philip Morris scientist told the company's president that it was "simply not an adequate explanation to say that smoking is a habit, or that it is social behavior." *Id.* at 223 (quotation marks omitted). In 1981, a Philip Morris executive wrote in an article: "Cigarettes are not just habit forming—the body builds up a requirement for them." *Id.* at 228 (quotation marks omitted). Although several industry attorneys expressed dismay at the publication of the article, none disagreed with it. *Id.* In 1985, Philip Morris's top management was informed that research showed that "the majority of smokers wished they did not smoke." *Id.* at 229 (quotation marks omitted). These and numerous other findings—all unchallenged—support the district court's conclusion that Defendants were aware that nicotine creates a chemical dependency far stronger than a mere habit.

The district court found that despite their knowledge Defendants made numerous statements trivializing and outright denying the dependence cigarettes cause. For example, in 1982 TI issued a press release summarizing testimony that smoking caused an "attachment" comparable to that produced by "tennis, jogging, candy, rock music, Coca-cola, members of the opposite sex and hamburgers." *Id.* at 281 (quotation marks omitted). In 1997, Philip Morris's CEO testified, "If [cigarettes] are behaviorally addictive or habit forming, they are much more like . . . Gummi Bears, and I eat Gummi Bears,

and I don't like it when I don't eat my Gummi Bears, but I'm certainly not addicted to them." *Id.* at 273 (quotation marks omitted). In a 1994 television interview, a TI official claimed that there was "no chemical addiction" to nicotine and stated, "[S]ometimes we use the word 'addiction' in very broad terms. We talk about being, you know, news junkies. We talk about being chocoholics." *Id.* at 285 (quotation marks omitted). A 1988 TI press release declared that "it has been impossible to establish that the feelings persons have upon giving up smoking are *anything but* that which would be expected when one is frustrated by giving up *any desired habit.*" *Id.* at 283 (quotation marks omitted, emphases added). Most directly, the district court found that Defendants had their representatives testify that nicotine "did not cause addiction *or dependence*," *id.* at 281 (emphasis added), rendering any supposed ambiguities in the word "addiction" beside the point.

The district court concluded that these and other findings reflected a campaign of statements intended to mislead the public into believing that giving up smoking is not markedly more difficult than giving up everyday habits. Although not every statement Defendants made was literally false, even partially true statements can be actionable fraud if intentionally misleading as to facts. *See, e.g., Emery v. Am. Gen. Fin., Inc.*, 71 F.3d 1343, 1348 (7th Cir. 1995) ("A half truth, or what is usually the same thing a misleading omission, is actionable as fraud, including mail fraud if the mails are used to further it, if it is intended to induce a false belief and resulting action to the advantage of the misleader and the disadvantage of the misled."). The district court concluded that Defendants' statements regarding addiction were misleading in this way, and given the above unchallenged factual

findings we are not "left with the definite and firm conviction that a mistake has been committed." *Boca Investerings*, 314 F.3d at 630.

D. Altria

In addition to the challenges to fraud liability raised by all Defendants, two Defendants—Altria and BATCo—make a number of arguments specific to them. We begin with Defendant Altria, the holding company owner of Defendant Philip Morris, which raises several challenges to the district court's finding of liability.

As an initial matter, Altria claims that the district court erred in finding that it used the mails in five of the nine predicate acts it allegedly committed directly. The district court specifically found, based on Defendants' routine mailing practices, that at least two of those five predicate acts were committed through use of the mails. *See Philip Morris*, 449 F. Supp. 2d at 884 (Racketeering Acts 69, 80). We need not decide whether this circumstantial inference amounted to clear error, as the other four predicate acts the district court found Altria committed are themselves sufficient to constitute a pattern of racketeering activity. *See id.* (Racketeering Acts 71-72, 74-75).

Altria's central argument is that mailings sent by lawyers could not possibly be mailings in furtherance of a scheme or artifice to defraud, citing several out-of-circuit cases largely standing for the proposition that ordinary litigation mailings containing false matter typically do not themselves constitute a scheme or artifice to defraud. *See United States v. Pendergraft*, 297 F.3d 1198, 1209 (11th Cir. 2002); *Nolan v. Galaxy Scientific Corp.*, 269 F. Supp. 2d 635, 643 (E.D. Pa. 2003); *Morin*

v. Trupin, 711 F. Supp. 97, 105-06 (S.D. N.Y. 1989); *Paul S. Mullin & Assocs., Inc. v. Bassett*, 632 F. Supp. 532, 540 (D. Del. 1986); *Spiegel v. Cont'l Ill. Nat'l Bank*, 609 F. Supp. 1083, 1088-90 (N.D. Ill. 1985). Whatever the merit of that proposition, it has nothing to do with the question before us. Altria makes a very different claim —that mailings sent in furtherance of a separately-proven scheme to defraud somehow fall outside the mail fraud statute's coverage because they are drafted and physically sent by lawyers who themselves have no fraudulent intent. This claim is without merit. Nothing in the mail fraud statute requires a mailing to be fraudulent at all, as long as the mailing is in furtherance of a fraudulent scheme. *See* 18 U.S.C. § 1341 (specifying that the mailing can be "any matter or thing whatever to be sent or delivered" as long as it is in furtherance of "any scheme or artifice to defraud"). Moreover, the statute looks to the intent of the individual who *caused* the mailing, not the individual who drafted or physically mailed it. *See United States v. Diggs*, 613 F.2d 988, 998 (D.C. Cir. 1979) ("[A] defendant 'causes' the use of the mails where he does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended." (quotation marks omitted)). Given that the district court permissibly inferred the corporate Defendants' intent from the intent of numerous high-level executives, *Philip Morris*, 449 F. Supp. 2d at 897, and given that it found that Defendants "caused" the mailings in order to further the scheme to defraud, *id.* at 881, the fact that attorneys participated in the actual drafting and mailing provides no immunity. Thus, we conclude that the district court properly found Altria liable for its direct participation in

the conduct of the affairs of the enterprise, leaving it unnecessary for us to consider Altria's objections to the findings that it participated through its control of Philip Morris.

Finally, Altria claims that the district court clearly erred in finding that the company joined a RICO conspiracy. We disagree. The district court's findings of fact regarding Altria's actions in furtherance of the goals of the enterprise, both directly and through Philip Morris, *see id.* at 907-08, as well as the voluminous findings of concerted action and explicit agreement by Defendants, amply support the circumstantial inference that Altria conspired with the other Defendants to violate RICO. *See, e.g., United States v. Mellen*, 393 F.3d 175, 191 (D.C. Cir. 2004) ("[A] conspiracy can be inferred from a combination of close relationships or knowing presence and other supporting circumstantial evidence." (quotation marks omitted)).

E. BATCo

Defendant BATCo claims that the district court erred in imposing liability on the basis of its conduct outside the United States. Noting that the district court found that its "activities and statements took place outside of the United States," *Philip Morris*, 449 F. Supp. 2d at 873, BATCo claims that it enjoys immunity from RICO liability because the statute has no extraterritorial reach. We need not decide today whether RICO has true extraterritorial reach—that is, whether it could reach foreign conduct with no impact on the United States—because the district court found BATCo liable on the theory that its conduct had substantial domestic effects. *Id.* Because conduct with substantial domestic

effects implicates a state's legitimate interest in protecting its citizens within its borders, Congress's regulation of foreign conduct meeting this "effects" test is "*not* an *extraterritorial* assertion of jurisdiction." *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 923 (D.C. Cir. 1984). Thus, when a statute is applied to conduct meeting the effects test, the presumption against extraterritoriality does not apply. *See Envtl. Def. Fund, Inc. v. Massey*, 986 F.2d 528, 531 (D.C. Cir. 1993) (noting that "the presumption [against extraterritoriality] is generally not applied where the failure to extend the scope of the statute to a foreign setting will result in adverse effects within the United States," citing *Laker Airways*).

BATCo argues that the effects test is inapplicable because the United States had no obligation to prove that Defendants' conduct had any effects whatsoever. Although BATCo attributes this to the fact that 18 U.S.C. § 1964(a) does not require the government to prove that it has been injured, we think it better explained by the fact that the mail and wire fraud statutes punish "the scheme, not its success." *Pasquantino v. United States*, 544 U.S. 349, 371, 125 S. Ct. 1766, 161 L. Ed. 2d 619 (2005). That said, BATCo's point has nothing to do with the case at hand. Here the district court found that BATCo's conduct "had substantial direct effects on the United States." *Philip Morris*, 449 F. Supp. 2d at 873. The fact that some other defendant might commit some other offense without effects in the United States hardly renders BATCo immune from liability for the domestic effects it did cause. Someone who fires a rifle from Canada into the United States and wounds his victim can plainly be convicted of attempted murder. *See Laker Airways*, 731 F.2d at 922 ("[W]hen

a malefactor in State *A* shoots a victim across the border in State *B*, State *B* can proscribe the harmful conduct."). This is so even though in general the government may prove attempted murder without establishing that the attempt had any effect whatsoever. Similarly, the fact that effects are not elements of mail and wire fraud offenses or associated RICO violations provides no immunity to those, like BATCo, whose fraud and racketeering has substantial and direct domestic effects.

Thus, we need decide only whether the district court erred in applying the effects test—which asks whether conduct has a substantial, direct, and foreseeable effect within the United States, *see Consol. Gold Fields PLC v. Minorco, S.A.*, 871 F.2d 252, 261-62 (2d Cir. 1989) (describing substantial effect as direct and foreseeable)—to the facts of this case. We see no error. The district court found that as part of the overall scheme to defraud, BATCo conducted sensitive nicotine research for Brown & Williamson abroad and secretly shared the results with Brown & Williamson in the United States. *Philip Morris*, 449 F. Supp. 2d at 298-304. It further found that BATCo, in concert with other Defendants, founded, funded, and actively participated in various international organizations, which Defendants themselves saw as instrumental to their efforts to perpetuate what the district court found to be their fraudulent scheme in the United States. *See id.* at 119-23. In one example, TI admitted that "the back-wash from events and attacks affecting the industry in smaller countries comes back powerfully to the USA," *id.* at 140 (quotation marks omitted), and praised INFOTAB, an international organization of which BATCo was a founding member, *id.* at 132, for "help[ing] the industry to unite in trying to combat the attacks," *id.* at 140 (quotation marks omitted).

Notwithstanding BATCo's demands for a nearly unattainable level of specificity, these unchallenged findings, together with the findings of the tremendous domestic effects of the fraud scheme generally, *see, e.g., id.* at 209, 307-08, make clear that the district court committed no error in finding that BATCo's participation had substantial, direct, and foreseeable effects in the United States. *Cf. Laker Airways*, 731 F.2d at 925- 26 (finding allegations that the anticompetitive elimination of a foreign airline increased domestic air fares adequate to support antitrust action without demanding further specificity).

V. Challenges to Likelihood of Future Violations

Having found Defendants' challenges to liability unavailing, we move on to the district court's determination that they are likely to commit future RICO violations if not enjoined. All Defendants challenge this finding on a number of common bases, and four Defendants —Altria, BWH, CTR, and TI—also bring separate challenges to the court's findings regarding them. We address each in turn.

A. Likelihood of Future Violations

Section 1964(a) grants district courts jurisdiction "to prevent and restrain" RICO violations. 18 U.S.C. § 1964(a). Hence, before a district court may order remedies under RICO it must find the defendant exhibits a reasonable likelihood of committing future violations of the Act. *Disgorgement Opinion*, 396 F.3d at 1198.

Here, the district court found a reasonable likelihood that Defendants would commit future RICO violations. *Philip Morris*, 449 F. Supp. 2d at 903-15. Defendants attack this finding, asserting: (1) the district court ap-

plied an erroneous legal standard, (2) the Master Settlement Agreement ("MSA") makes future violations unlikely, and (3) Defendants' business practices and public positions alone preclude future violations. We conclude the district court applied the correct legal standard and its factual conclusions were not clearly erroneous.

In the mid-1990s, the attorneys general of several states brought suit against the major tobacco companies for the reimbursement of state costs associated with smoking. Five Defendants, Philip Morris, Reynolds, Brown & Williamson, Lorillard, and Liggett entered into a settlement agreement, the MSA, with forty-six states and the District of Columbia. The MSA prohibited, *inter alia*, youth marketing, any material misrepresentations regarding the health consequences of tobacco use, agreements between manufacturers to limit either competition or the distribution of information about the health effects associated with smoking, and other specific marketing techniques (e.g., cartoon characters and billboards). The MSA specifically required the dissolution of CTR, TI, and CIAR. The National Association of Attorneys General and the individual states' attorneys general enforce the MSA, which requires informal dispute resolution before any enforcement action commences whenever possible.

To obtain equitable remedies, the government must demonstrate a "reasonable likelihood of further violation[s] in the future." *Savoy Indus., Inc.*, 587 F.2d at 1168 (quotation marks omitted). Considered under the totality of the circumstances, three factors determine whether a reasonable likelihood exists: "whether a defendant's violation was isolated or part of a pattern, whether the violation was flagrant and deliberate or

merely technical in nature, and whether the defendant's business will present opportunities to violate the law in the future." *SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1228 (D.C. Cir. 1989). The district court applied this standard—a standard both sides agree is appropriate. *Philip Morris*, 449 F. Supp. 2d at 909; Defs. Br. 39-40; Gov. Br. 182.

Defendants quibble with two aspects of the district court's application. First, Defendants assert the district court could not rely on "inferences drawn from past conduct alone" because the MSA "already proscribes future violations" and "imposes a legal barrier to the repetition of such conduct in the future." Defs. Br. 40. This is an odd argument, suggesting a tort settlement automatically limits the remedial options in a RICO suit. Notably, the first two factors of the *First City* test focus entirely on inferences arising from past conduct. 890 F.2d at 1228. And, as the district court correctly found, "[t]he likelihood of future wrongful acts is frequently established by inferences drawn from past conduct." *United States v. Philip Morris USA*, 316 F. Supp. 2d 6, 10 n.3 (D.D.C. 2004) (quotation marks omitted); *see also SEC v. Bilzerian*, 29 F.3d 689, 695 (D.C. Cir. 1994) (inferring a likelihood of future violations based on the nature of past conduct); *SEC v. Gruenberg*, 989 F.2d 977, 978 (8th Cir. 1993); *First City*, 890 F.2d at 1228-29. Defendants attempt to bolster their position by claiming the MSA precludes the need for injunctions by fully addressing their prior misconduct. As discussed *infra*, future violations remain likely notwithstanding the MSA. Therefore, Defendants' argument fails.

Also, Defendants deftly mischaracterize the district court's opinion. Based on a single footnote in the opinion's section discussing the MSA's failure to alter Defendants' conduct and concluding remedies in this case were appropriate, *Philip Morris*, 449 F. Supp. 2d at 913 n.82, Defendants accuse the trial court of impermissibly "shift[ing] the burden to defendants to prove that RICO violations will not occur in the future . . . under the 'absolutely clear' test." Defs. Br. 42. Contrary to Defendants' fears, the district court obviously did not intend to announce a new standard or alter the reigning standard via footnote. The *First City* standard was carefully articulated at the start of the discussion addressing future violations and conscientiously applied. *Philip Morris*, 449 F. Supp. 2d at 908-09, 911-13. The footnote, regarding voluntary termination of illegal conduct, appears much later in the opinion where the court sought to emphasize the suspension of disbelief necessary to agree with Defendants, noting the court must assume "Defendants have complied with and will continue to comply with the terms of the MSA, and that the MSA has adequate enforcement mechanisms" in order to conclude "the MSA obviates the need for injunctive relief." *Id.* at 913 (quotation marks omitted). This is a far cry from altering the legal standard. Indeed, the district court found, under the correct standard, that Defendants continued to commit violations even after 1999, well after the execution of the MSA. *Id.* at 910-11.

Since the district court applied the standard enunciated in *Savoy* and *First City* and gave appropriate weight to the inferences drawn from Defendants' past conduct, we uphold the district court's decision to order remedies.

The district court concluded the MSA "alone [could not] remove the reasonable likelihood of Defendants' future RICO violations." *Id.* Defendants contend the MSA effectively prevents prospective RICO violations because it prohibits them from participating in an "enterprise" or committing any "predicate acts." The district court, however, found Defendants began to evade and at times even violate the MSA's prohibitions almost immediately after signing the agreement and, consequently, concluded the MSA did not limit the court's ability to order "[a]ppropriate [r]emedies." *Id.* The court's factual findings are not clearly erroneous.

Defendants assert the MSA prevents their participation in a RICO enterprise because the organizations that allowed for joint activity no longer exist, and neither the government nor the district court identified any "joint activity" between Defendants after 1998, the start of the MSA. Defendants' post-agreement activities belie these statements. For example, though the MSA required Defendants to dissolve CIAR, only two days after signing the MSA Lorillard's general counsel wrote Philip Morris, Reynolds, and Brown & Williamson asking to "discuss the status of the plan to reinstate CIAR." *Id.* at 798 (quotation marks omitted). Shortly thereafter, Covington & Burling LLP informed the CIAR contractors "[t]he members of CIAR have decided to create a new organization to continue the work. . . . The members of CIAR that will be members of the new organization intend to continue to fund the research." Gov. Ex. 75,412, at 2. Subsequently, in 2000, Philip Morris initiated a new research program that had the same offices, phone numbers, and board as CIAR and many of the same employees, management, researchers, peer re-

viewers, and grantees. *Philip Morris*, 449 F. Supp. 2d at 798-99.

CIAR is not the lone example of Defendants' organizations poised to circumvent the MSA's prohibitions against joint activities or participation in an enterprise. The district court found, with the exception of CTR and TI, "all of the other organizations either still exist or can be readily re-activated." *Id.* at 871. For example, even at the time of trial Defendants continued to participate in the Center for Cooperation in Scientific Research Relative to Tobacco ("CORESTA"), "a nonprofit making association with objectives to enhance the scientific cooperation for research on tobacco" perceived as "unique and very valuable" because it enjoys the perception of "being objective, technical and independent." Gov. Ex. 21,788, at 1.

Defendants presume the MSA's prohibition against joint activity is effective. The record, however, demonstrates the tobacco companies retain both the ability and the desire to continue joint activities. Accordingly, the district court did not commit clear error when it determined the MSA could not effectively prevent Defendants' participation in an enterprise.

Defendants next assert the MSA's "scores of injunctions and related prohibitions" prevent "repetition of the core wrongdoing." Defs. Br. 48. The district court determined the MSA does not prevent Defendants' commission of future racketeering acts because: (1) Defendants have not fully complied with the MSA, (2) the States could not be relied upon "to vigorously enforce the MSA," *see* Br. For Amici Curiae States 7-11, (3) some provisions of the MSA have and will expire, and

(4) BATCo and Altria are not subject to the agreement. *Philip Morris*, 449 F. Supp. 2d at 913-15.

As evidence of the MSA's failures and pitfalls, the district court noted that despite the MSA Defendants still fraudulently denied the dangers of secondhand smoke, marketed "low tar" cigarettes as a healthier alternative to quitting, and falsely denied manipulating nicotine delivery and marketing to youth. *Id.* at 910. Defendants offer no rebuttal to these factual findings, but instead argue "failure to comply with all the details or the 'spirit' of the MSA does not even begin to approach a RICO violation." Defs. Br. 50. Obviously. But as the district court rightly recognized, Defendants cannot hide behind the MSA to avoid the imposition of RICO remedies when they do not comply with the agreement. *Philip Morris*, 449 F. Supp. 2d at 913. Therefore, the district court did not commit clear error when it determined the MSA does not adequately prevent or restrain Defendants' future racketeering activities and did not abuse its discretion by ordering equitable relief.

Defendants claim they have "admitted for years" that "smoking causes lung cancer" and other serious diseases, "smoking is addictive," and "low tar cigarettes may not be safer." Defs. Br. 53-54, 56. They insist their positions on these issues "preclude future RICO violations." *Id.* at 53. The district court acknowledged Defendants' varying degrees of lip service to these facts, but disagreed that these admissions translated into a guarantee against later violations.

According to the district court, "Defendants' essential position on the relationship of smoking and health remains virtually unchanged" from the fraudulent posi-

tions it first took in the 1950s. *Philip Morris*, 449 F. Supp. 2d at 204; *see also id.* at 204-08 (citing corporate statements and statements from Defendants' executives). The district court condemned Defendants for failing to embrace the Surgeon General's definition of addiction, to admit nicotine specifically creates and sustains addiction, or to "acknowledge[ ] . . . the reason quitting smoking is so difficult, and not simply a function of individual will power, is because of its addictive nature." *Id.* at 286; *see also id.* at 284-88. Finally, examples in the record of Defendants' marketing campaigns and internal documents amply support the district court's conclusion that Defendants "continue to make[ ] false and misleading statements regarding low tar cigarettes in order to reassure smokers and dissuade them from quitting." *Id.* at 507-08. While we may not have reached all the same conclusions as the district court, under the highly deferential clearly erroneous standard the district court's factual findings have sufficient evidentiary support; its decision to order equitable relief was not an abuse of discretion.

B. Altria

Altria urges, based on its status as a holding company, no factual basis exists for finding it would violate RICO in the future. According to the district court, though, despite Altria's holding company status it "effectively and actively controls the activities of all of its subsidiaries, including Defendant Philip Morris." *Philip Morris*, 449 F. Supp. 2d at 203-04 n.12. The record establishes that Altria management oversees subsidiary policies and operations, *id.* at 907-08, and Altria does not dispute its control over Philip Morris. Moreover, Altria itself "participated directly" in the RICO enter-

prise and conspiracy. *Id.* at 907. With direct culpability and this level of plenary power over its subsidiaries, Altria clearly remains capable of future RICO violations. Therefore, we uphold the district court's issuance of remedies against Altria.

C. BWH

BWH makes an argument similar to that of Altria. In 2004, Brown & Williamson merged all domestic tobacco operations with Reynolds and was reconstituted into Brown & Williamson Holdings ("BWH"). The district court made no factual findings specific to BWH. Rather, the district court focused throughout its opinion on Brown & Williamson. *Philip Morris*, 449 F. Supp. 2d at 31 n.4 (describing Brown & Williamson as "now part of Reynolds American"). The entire rest of the opinion refers to "Brown & Williamson" without any mention of the reconstituted holding company.

Based on BWH's status as a "passive holding company," BWH argues the district court erred in finding it is likely to commit future RICO violations. As discussed in relation to Altria, a company's status as a holding company by itself does not preclude RICO liability. Where a holding company, such as Altria, participates directly in the original violations and retains control over subsidiary tobacco operations, it remains capable of repeating its misconduct.

BWH could not have participated in this RICO enterprise as it did not then exist. Nonetheless, if it exercises plenary control over the tobacco operations of its subsidiaries, then, like Altria, it could commit later violations. Because the district court failed to make any findings about the extent of BWH's control over tobacco opera-

tions, we cannot know the company's current capabilities. Therefore, we cannot determine whether a reasonable likelihood exists that BWH will commit future RICO violations. Accordingly, we remand this issue for further fact finding and clarification.

D. Mootness as to CTR and TI

CTR and TI argue that the district court's findings relating to the likelihood they will commit future violations render the case against them moot. We agree. The MSA demanded the dissolution of both organizations. At the time of trial, CTR and TI only existed to wind up their respective affairs. The district court found "no reasonable likelihood of future violations" on the part of TI or CTR and consequently ordered no remedies against them. *Philip Morris*, 449 F. Supp. 2d at 915. The court actually encouraged the government to reconsider proceeding against these entities as they "seem to have no actual ability to continue alleged past RICO violations." *Id.* at 916 (quotation marks omitted).

"Federal courts lack jurisdiction to decide moot cases because their constitutional authority extends only to actual cases or controversies." *Larsen v. U.S. Navy*, 525 F.3d 1, 4 (D.C. Cir. 2008) (quotation marks omitted). A case is moot when "the challenged conduct ceases such that there is no reasonable expectation that the wrong will be repeated" in circumstances where "it becomes impossible for the court to grant any effectual relief whatever to the prevailing party." *City of Erie v. Pap's A.M.*, 529 U.S. 277, 287, 120 S. Ct. 1382, 146 L. Ed. 2d 265 (2000) (quotation marks omitted). For both CTR and TI these requirements have been met. The government nowhere disputes Defendants' claim that CTR and TI no longer exist. They cannot possibly commit future

RICO violations. Accordingly, we vacate the judgment as to CTR and TI and remand with directions to dismiss.

VI. Challenges to Remedies

Finally, as to those Defendants the district court properly found likely to commit future RICO violations, we address their challenges to particular remedies the district court imposed. We also address the cross-appeal seeking additional remedies the district court denied.

A. Subsidiaries

First, Defendants object to the inclusion of their subsidiaries among the persons bound by the remedial order. Rule 65 of the Federal Rules of Civil Procedure indicates that an injunction binds only the parties; their "officers, agents, servants, employees, and attorneys"; and "other persons who are in active concert or participation with" the aforementioned persons. FED. R. CIV. P. 65(d)(2). The rule derives from the common law doctrine that an injunction "not only binds the parties defendant but also those identified with them in interest, in 'privity' with them, represented by them or subject to their control"—any person or entity through whom the defendants might carry out enjoined activity and so nullify the order. *Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 14, 65 S. Ct. 478, 89 L. Ed. 661 (1945). A subsidiary corporation is in privity with its parent "in respect to the common corporate business" to the extent it is "so identified in interest with [the parent] that [it] represents precisely the same legal right in respect to the subject matter involved" in the injunction. *Jefferson Sch. of Soc. Sci. v. Subversive Activities Control Bd.*, 331 F.2d 76, 83 (D.C. Cir. 1963).

The term "subsidiaries" in the remedial order cannot expand the scope of the injunction beyond that defined by Rule 65(d); however, subsidiaries of Defendants may be personally bound by the order to the extent that they are agents of or in privity with Defendants in the common corporate business of manufacturing, designing, marketing, or selling cigarettes. (Like any person with actual notice of the injunction, subsidiaries that act in concert with Defendants to violate the order would also be subject to contempt.) The record on appeal does not reveal facts sufficient for us to evaluate over which subsidiaries, if any, Defendants exercise sufficient control or with which they so identify in interest regarding cigarettes that they would legitimately fall within the purview of the injunction order. We therefore vacate the order to the extent that it binds all Defendants' subsidiaries and remand to the district court for proceedings to determine whether inclusion of Defendants' subsidiaries, and which subsidiaries, satisfies Rule 65(d).

B. General Injunctions

The district court permanently enjoined Defendants "from committing any act of racketeering, as defined in 18 U.S.C. § 1961(1), relating in any way to the manufacturing, marketing, promotion, health consequences or sale of cigarettes in the United States," and from

> making, or causing to be made in any way, any material false, misleading, or deceptive statement or representation, or engaging in any public relations or marketing endeavor that is disseminated to the United States public and that misrepresents or suppresses information concerning cigarettes. Such material statements include, but are not limited to, any

> matter that: (a) involves health, safety, or other areas with which a reasonable consumer or potential consumer of cigarettes would be concerned; (b) a reasonable consumer or potential consumer would attach importance to in determining whether to purchase or smoke cigarettes; or (c) the Defendant, Covered Person or Entity making the representation knows or has reason to know that its recipient regards or is likely to regard as important in determining whether to purchase cigarettes or to smoke cigarettes, even if a reasonable person would not so regard it.

Philip Morris, 449 F. Supp. 2d at 938. Defendants assert that, "in the face of more than 1,600 pages of findings," these injunctions do not sufficiently specify the acts restrained, in violation of Rule 65(d), due process, and the First Amendment. Defs. Br. 137.

Rule 65(d) requires every order granting an injunction to "state its terms specifically [and] describe in reasonable detail—and not by referring to the complaint or other document—the act or acts restrained or required." FED. R. CIV. P. 65(d)(1)(B)-(C). "The Rule was designed to prevent uncertainty and confusion on the part of those faced with injunctive orders." *Schmidt v. Lessard*, 414 U.S. 473, 476, 94 S. Ct. 713, 38 L. Ed. 2d 661 (1974). Because an injunction "prohibits conduct under threat of judicial punishment, basic fairness requires that those enjoined receive explicit notice of precisely what conduct is outlawed." *Id.* Under this standard, we have held injunctions to be too vague when they enjoin all violations of a statute in the abstract without any further specification, or when they include, as a necessary descriptor of the forbidden conduct, an undefined term

that the circumstances of the case do not clarify. *See Wash. Inv. Network*, 475 F.3d at 407 (order enjoined all future violations of the applicable statutes, without clarifying the acts restrained); *Gulf Oil Corp. v. Brock*, 778 F.2d 834, 843 (D.C. Cir. 1985) (order enjoined "substantially similar" conduct without further specification in a case that provided no examples of what is "similar"); *Common Cause v. NRC*, 674 F.2d 921, 926-27 (D.C. Cir. 1982) (order enjoined conduct "similar in nature" without further specification in a case that provided no examples of what is "similar"); *SEC v. Savoy Indus., Inc.*, 665 F.2d 1310, 1318-19 (D.C. Cir. 1981) (defendant enjoined not "to engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person"); *see also Schmidt*, 414 U.S. at 476, 94 S. Ct. 713 (enjoined "the present Wisconsin scheme"). Even if it tracks statutory language, a general injunction is not too vague if it relates the enjoined violations to the context of the case. *See Savoy Indus., Inc.*, 665 F.2d at 1316-17 (tracking language of the statute in context of defendant's relationship with issuers of securities). Indeed, we must always apply the fair notice requirement "in the light of the circumstances surrounding (the injunction's) entry: the relief sought by the moving party, the evidence produced at the hearing on the injunction, and the mischief that the injunction seeks to prevent." *Common Cause*, 674 F.2d at 927 (quotation marks omitted).

The two injunctions at issue here sufficiently specify the activities enjoined as to provide Defendants with fair notice of the prohibited conduct. The district court did not abstractly enjoin Defendants from violating RICO or making false statements, but instead specified the matters about which Defendants are to avoid making false

statements or committing racketeering acts: the manufacturing, marketing, promotion, health consequences, and sale of cigarettes, along with related issues that Defendants have reason to know are of concern to cigarette consumers. This is not a generalized injunction to obey the law, especially when read in the context of the district court's legal conclusions and 4,088 findings of fact about fraud in the manufacture, promotion, and sale of cigarettes. These injunctions may be broad, but breadth is warranted "to prevent further violations where[, as here,] a proclivity for unlawful conduct has been shown." *Savoy Indus. Inc.*, 665 F.2d at 1317 (quoting *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 192, 69 S. Ct. 497, 93 L. Ed. 599 (1949) (holding that the "record of continuing and persistent violations of the [statute] would indicate that that kind of a [general] decree was wholly warranted in this case")). Defendants complain that the volume of findings in this case actually make understanding the injunctions more difficult and chill speech because some of the district court's findings present "express prohibitions" whereas others, like the use of white filter paper for cigarettes, "simply reflect the district court's disapproval" of aspects of Defendants' business practices without finding the conduct fraudulent. Defs. Br. 137. This objection answers itself, as the plain terms of the injunctions prohibit only conduct that would constitute a racketeering act or a "material false, misleading, or deceptive statement or representation," not all activities the court mentioned in its findings.

C. Extraterritorial Effect

Paragraph four of the injunction prohibits the use of "any express or implied health message or health descriptor for any cigarette brand." *Philip Morris*, 449

F. Supp. 2d at 938. The government concedes that this prohibition "should not be read to govern overseas activities with no domestic effect." Gov. Br. 215-16. But because paragraph four contains no such limiting language, *see Philip Morris*, 449 F. Supp. 2d at 938, we vacate that provision and remand for the district court to reformulate it so as to exempt foreign activities that have no substantial, direct, and foreseeable domestic effects. *See supra* Part IV.E.

D. Corrective Statements

As part of the remedial order, the district court ordered Defendants to disseminate "corrective statements" concerning the topics about which they had previously misled consumers. The court will determine the precise content of the statements at a future date after receiving proposals from the parties, but ordered that they must address five topics: (1) the adverse health effects of smoking; (2) the addictiveness of smoking and nicotine; (3) the lack of any significant health benefit from smoking light cigarettes; (4) the manufacturers' manipulation of cigarette design and composition to ensure optimum nicotine delivery; and (5) the adverse health effects of exposure to secondhand smoke. *Philip Morris*, 449 F. Supp. 2d at 938-39. The remedial order sets out schedules for the manufacturer Defendants to follow in disseminating the corrective statements in cigarette package onserts, retail point-of-sale displays, newspapers, television, and their company websites. *Id.* at 939-41. Defendants object to the corrective statements as a whole on the grounds that they did not receive adequate notice of and opportunity to respond to the government's proposed remedy and that the remedy extends beyond the court's jurisdiction under RICO.

Regarding the specific means of disseminating the statements, Defendants argue that cigarette package onserts violate the Labeling Act, that the point-of-sale displays are duplicative and impose severe burdens on retailers, and that requiring Defendants to make corrective statements in various media apart from existing advertising violates the First Amendment.

Notice

Defendants argue that because the government did not disclose its final corrective statements proposal until its post-trial proposed remedial order, the district court denied Defendants due process by ordering a version of that remedy without providing Defendants adequate notice and an opportunity to respond. Although Defendants purport to press this objection in a general fashion "with respect to many other remedies imposed by the district court," they state it with sufficient specificity for our consideration only with regard to corrective statements. Defs. Br. 135. The exact content of the statements is yet to be determined and so is not before us at this stage.

The sequence of events surrounding the remedies phase of the trial did not deprive Defendants of the process they were due. Defendants received the government's proposed remedies, including a general corrective statements proposal, two months before the remedies phase of the trial began. They participated in a fourteen-day, fully briefed remedies trial, at which thirteen witnesses testified and were subject to cross- examination, including at least one government witness who testified about corrective statements. *Philip Morris*, 449 F. Supp. 2d at 923. In its post-trial proposed remedial order, the government specified the five categories

of corrective statements (which correspond to the subjects about which the district court found Defendants committed fraud) and the details of its recommended publication campaign. Defendants responded to the government's proposed order in their own post-trial brief and raised numerous legal objections to the propriety of the corrective statements remedy, which the district court considered and resolved in its final opinion and order. *See id.* at 921-23. Defendants have not demonstrated any prejudice from this sequence of events. In their offer of proof to the district court they asserted only that if they had known more "specifics" of the government's proposed remedy before the hearing, they would have retained, and might have offered testimony from, one or more experts addressing the proposal. *See* Defs. Offer of Proof at 9-10. Even on appeal, Defendants suggest no testimony they would have offered, no lines of cross-examination inquiry they would have pursued, and no factual dispute they would have addressed.

This case bears no resemblance to *United States v. Microsoft Corp.*, 253 F.3d 34 (2001), as Defendants attempt to suggest. In *Microsoft*, the district court ordered the break-up and restructuring of Microsoft into two companies without holding any evidentiary hearing to resolve the numerous disputed fact questions surrounding the remedy. *Id.* at 101-02. Microsoft submitted two offers of proof identifying serious unresolved issues of fact and included 53 pages of submissions specifying the evidence it would introduce to challenge the government's representations. *Id.* at 103. *Microsoft* gives us no reason to believe Defendants in this case—who enjoyed pre-trial notice and a lengthy remedies trial, and have shown no prejudice—suffered a denial of due process.

Section 1964

A district court that finds a defendant civilly liable for violating RICO has jurisdiction "to prevent and restrain violations of [RICO] by issuing appropriate orders. . . . " 18 U.S.C. § 1964(a). Congress limited relief under section 1964(a) to forward-looking remedies aimed at preventing and restraining future RICO violations. *Disgorgement Opinion*, 396 F.3d at 1198, 1200. Earlier in this litigation, we held that the statute does not authorize disgorgement because it is "both aimed at and measured by *past* conduct": "[i]t is measured by the amount of prior unlawful gains and is awarded without respect to whether the defendant will act unlawfully in the future." *Id.* at 1198. Defendants argue that corrective statements are similarly "focused on remedying the effects of past conduct," *id.*, because they seek to correct Defendants' campaign of deceptive marketing.

The government urges that the corrective statements are a forward-looking remedy authorized under section 1964(a) because future advertising that "may not contain any statements which are themselves false or deceptive" nevertheless inevitably builds upon Defendants' previous false statements and, if uncorrected, "continues the deception, albeit implicitly rather than explicitly," rendering those advertisements "part of the continuing deception of the public." *Warner-Lambert Co. v. FTC*, 562 F.2d 749, 769 (D.C. Cir. 1977); *see Novartis Corp. v. FTC*, 223 F.3d 783, 787 (D.C. Cir. 2000). We do not doubt that consumers may "continue to make purchasing decisions based on the false belief" created by a manufacturer's false advertising even when that advertising ceases, *Novartis Corp.*, 223 F.3d at 787 (quoting *Warner-Lambert Co.*, 562 F.2d at 762), but it is less

clear whether, and in what circumstances, continuing consumer confusion created by uncorrected but truthful advertising would amount to a knowing fraud. Section 1964(a) authorizes only remedies that prevent and restrain future RICO violations, not all future effects of past RICO violations, *Disgorgement Opinion*, 396 F.3d at 1198, or all future unseemly business practices.

We need not consider this question, however, because as the district court observed and the intervenors here argue, requiring Defendants to issue corrective statements will "prevent and restrain them from making fraudulent public statements on smoking and health matters in the future." *Philip Morris*, 449 F. Supp. 2d at 926. Defendants will be impaired in making false and misleading assurances about, for instance, smoking-related diseases or the addictiveness of nicotine—as the district court found they continue to do, *id.* at 925-26—if they must at the same time communicate the opposite, truthful message about these matters to consumers. Requiring Defendants to reveal the previously hidden truth about their products will prevent and restrain them from disseminating false and misleading statements, thereby violating RICO, in the future.

Package onserts

One of the vehicles for the corrective statements is a cigarette package onsert, which the district court ordered Defendants to "affix to cigarette packaging, either on the outside of or within the outer cellophane wrapping around the package . . . in the same manner as certain Defendants, such as Philip Morris and Brown & Williamson, have utilized package onserts in the past." *Philip Morris*, 449 F. Supp. 2d at 939. Defendants object that the onserts violate the Federal Cigarette La-

beling and Advertising Act ("Labeling Act"), which provides that "[n]o statement relating to smoking and health, other than the statement required by section 1333 of this title, shall be required on any cigarette package." 15 U.S.C. § 1334(a).

The Labeling Act defines a "package" as "a pack, box, carton, or container of any kind in which cigarettes are offered for sale, sold, or otherwise distributed to consumers." *Id.* § 1332(4). A package onsert is "[a] communication affixed to but separate from an individual cigarette pack and/or carton purchased at retail by consumers, such as a miniature brochure included beneath the outer cellophane wrapping or glued to the outside of the cigarette packaging." *Philip Morris*, 449 F. Supp. 2d at 948; *see Schwab v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 992, 1084-85 (E.D. N.Y. 2006) (defining onserts as "pamphlets attached to the outside of cartons or packs of cigarettes"), *rev'd on other grounds by McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215 (2d Cir. 2008); *United States v. Star Scientific, Inc.*, 205 F. Supp. 2d 482, 484 (D. Md. 2002) (defining onsert as "a type of external package label").

These definitions show that the corrective statements in an onsert are not "statement[s] . . . on [a] package," 15 U.S.C. § 1334(a), but rather statements in a brochure attached to or included with a package, and thus are not prohibited by the plain language of the Labeling Act. *See Philip Morris*, 449 F. Supp. 2d at 928 n.89. Congress could have used more expansive language to reach statements in onserts had it chosen to do so, but it chose only to preempt the requiring of alternative statements about smoking and health "on any cigarette package." Moreover, the district court and the

parties appear to have recognized the distinction between packages and onserts throughout the trial. *See id* . at 206 ("Philip Morris has never told its customers on its cigarette packaging or in onserts that it agrees that smoking causes cancer and other diseases in smokers."), 288 ("Philip Morris replaced the pre- existing package labels with onserts."), 424 ("[Brown & Williamson] began a new test market . . . using its redesigned packaging and onsert. . . . Star Scientific . . . added an informational 'onsert' attached to the package."); Trial Tr., Jan. 10, 2005 (Philip Morris senior vice president distinguishing between cigarette pack and onsert). We therefore conclude that the onsert remedy does not violate the Labeling Act.

Point-of-sale displays

The district court ordered each Defendant with a retail merchandising program—whereby retailers agree to use the manufacturer's in-store advertising—to design countertop and header displays containing the corrective statements and "require retailers who participate in such program" to display them for two years. *Philip Morris,* 449 F. Supp. 2d at 939-40. The free-standing countertop displays must be at least thirty inches high and eighteen inches wide, and retailers must place them on their counters "within the line-of-sight of any customer who is standing in line for the register." *Id.* at 946. The header displays must be of at least equivalent size to Defendants' other brand advertising headers and placed "in an equivalent position with any other brand advertising header" at the top of the cigarette display case. *Id.* at 939-40, 947. Under the injunctive order, each Defendant must "suspend from its Retail Merchandising Program for a period of one year any

retailer that fails to comply with this provision." *Id.* at 940.

Retailers affected by this order—none of whom were involved in the litigation in any way—did not receive notice of this remedy or an opportunity to present evidence or arguments to the district court regarding the impact the injunction would have on their businesses. Nor does it appear that the district court independently considered the impact of this program on affected retailers. In their appellate brief as amicus curiae and in affidavits filed with Defendants' motion for a stay of final judgment pending appeal, the National Association of Convenience Stores represents that this injunction will cost retailers substantial revenue. The convenience stores indicate that countertop space is the most important space within a convenience store, and the loss of one square foot of countertop space can cost the industry $82 million in sales per year. Yet if the retailers choose not to carry the countertop displays, Defendants must suspend them from their retail merchandising program for one year, which one retailer asserted would cost ten to fifteen percent of his convenience stores' annual profits. *See* Hartman Aff. at 2.

Section 1964(a) explicitly cautions that in crafting an injunctive remedy the court must "mak[e] due provision for the rights of innocent persons." 18 U.S.C. § 1964(a). We believe that the district court exceeded its authority by failing to consider the rights of retailers and crafting an injunction that works a potentially serious detriment to innocent persons not parties to or otherwise heard in the district court proceedings. Even though not explicitly bound by the terms of an injunction on pain of contempt, third parties may be so adversely affected by an

injunction as to render it improper. *See, e.g., Cook Inc. v. Boston Scientific Corp.*, 333 F.3d 737, 744 (7th Cir. 2003).

We therefore vacate the order regarding point-of-sale displays and remand for the district court to evaluate and "mak[e] due provision for the rights of innocent persons," either by abandoning this part of the remedial order or by crafting a new version reflecting the rights of third parties. 18 U.S.C. § 1964(a). Of course, any such remedy the district court imposes on remand can only affect contracts entered after the injunctive order issues. *See Nat'l Wildlife Fed'n v. Burford*, 835 F.2d 305, 315 (D.C. Cir. 1987) (explaining an injunction's validity due to the fact that it "does not affect the contractual rights of third parties"). In addition, we agree with Defendants that the injunction appears to order each Defendant separately to require the same retail store to display substantively identical, but separate, signs. The government concedes that, despite the language of the order, the district court could not have intended to require the burden of multiple duplicative displays at each retail store. We therefore direct the district court, if it concludes that some form of a point-of-sale display injunction is still appropriate after considering the rights of third parties and existing contracts, to clarify that its order does not require duplicative displays.

First Amendment

The district court also ordered each Defendant to publish the corrective statements on its corporate website, as a one-time full-page advertisement in thirty-five major newspapers, and as at least ten advertisements on a major television network over the course of one year. *Philip Morris*, 449 F. Supp. 2d at 939-41. The

court chose these media in order to "structure a remedy which uses the same vehicles which Defendants have themselves historically used to promulgate false smoking and health messages." *Id.* at 928. The court concluded compelled corrective advertising is permissible under the commercial speech doctrine. *Id.* at 926-28.

The First Amendment protects against government infringement on "the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714, 97 S. Ct. 1428, 51 L. Ed. 2d 752 (1977). This holds true whether applied to individuals, *see W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642, 63 S. Ct. 1178, 87 L. Ed. 1628 (1943), or to companies, *see Pac. Gas & Elec. Co. v. Pub. Utils. Com.*, 475 U.S. 1, 16, 106 S. Ct. 903, 89 L. Ed. 2d 1 (1986) ("For corporations as for individuals, the choice to speak includes within it the choice of what not to say."). In limited circumstances, however, courts have upheld the government's ability to dictate the content of mandatory speech. This largely occurs in the commercial context.

Under the commercial speech doctrine, the government's "power to regulate commercial transactions justifies its concomitant power to regulate commercial speech that is 'linked inextricably' to those transactions." *44 Liquormart v. Rhode Island*, 517 U.S. 484, 499, 116 S. Ct. 1495, 134 L. Ed. 2d 711 (1996). Thus, the government may require commercial speech to "appear in such a form, or include such additional information, warnings, and disclaimers, as are necessary to prevent its being deceptive." *Va. Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762, 96 S. Ct. 1817, 48 L. Ed. 2d 346 (1976). Because commercial speech receives a lower level of protection under the

First Amendment, burdens imposed on it receive a lower level of scrutiny from the courts. *Zauderer v. Office of Disciplinary Counsel of Supreme Court*, 471 U.S. 626, 637, 105 S. Ct. 2265, 85 L. Ed. 2d 652 (1985); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 562-64, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980). Although the standard for assessing burdens on commercial speech has varied, *Bd. of Trs. v. Fox*, 492 U.S. 469, 476-78, 109 S. Ct. 3028, 106 L. Ed. 2d 388 (1989) (describing the diverse levels of scrutiny applied in various cases, including *Central Hudson*, 447 U.S. at 566, 100 S. Ct. 2343, *In re R.M. J.*, 455 U.S. 191, 203, 102 S. Ct. 929, 71 L. Ed. 2d 64 (1982), and *Zauderer*, 471 U.S. at 644, 105 S. Ct. 2265), the Supreme Court's bottom line is clear: the government must affirmatively demonstrate its means are "narrowly tailored" to achieve a substantial government goal, *id.* at 480, 109 S. Ct. 3028.

Defendants object that the "freestanding" corrective statements violate the First Amendment because they are not connected to existing advertising and, therefore, cannot be considered commercial speech. That being the case, Defendants contend the less rigorous commercial speech standard does not apply. Alternatively, Defendants argue that, even if these statements are commercial speech, the corrective statements do not directly and materially advance a substantial government interest. *See Cent. Hudson*, 447 U.S. at 566, 100 S. Ct. 2343. Defendants' arguments misunderstand the commercial speech doctrine and misstate the commercial speech standard.

Defendants' first argument, that the stand-alone corrective statements do not fall within the commercial

speech doctrine because they are not attached to advertisements, is a red herring. The context of the corrective statements does not dictate the level of scrutiny; rather, the level of scrutiny depends on the nature of the speech that the corrective statements burden. *Riley v. Nat'l Fed'n of Blind*, 487 U.S. 781, 796, 108 S. Ct. 2667, 101 L. Ed. 2d 669 (1988) ("Our lodestars in deciding what level of scrutiny to apply to a compelled statement must be the nature of the speech taken as a whole and the effect of the compelled statement thereon."). Here, the district court clearly imposed these statements as a burden on Defendants' current and future commercial speech. *Philip Morris*, 449 F. Supp. 2d at 926-28 (justifying ordering the freestanding corrective statements under the commercial speech doctrine).

Commercial speech is defined as "expression related solely to the economic interests of the speaker and its audience" or "speech proposing a commercial transaction." *Cent. Hudson*, 447 U.S. at 561-62, 100 S. Ct. 2343. In addition to information related to proposing a particular transaction, such as price, it can include material representations about the efficacy, safety, and quality of the advertiser's product, and other information asserted for the purpose of persuading the public to purchase the product. *See, e.g., Zauderer*, 471 U.S. at 637 & n.7, 639-40, 105 S. Ct. 2265 (information and legal advice about a defective product and the possibility of suing were commercial); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66-68, 103 S. Ct. 2875, 77 L. Ed. 2d 469 (1983) (informational brochures discussing "important public issues such as venereal disease and family planning" distributed by contraceptives manufacturer were commercial); *Brown & Williamson Tobacco Corp.*, 778 F.2d at 38, 43 (claims that cigarettes contained one milli-

gram of tar and were "99% tar free" were commercial); *Nat'l Comm'n on Egg Nutrition v. FTC*, 570 F.2d 157, 159, 163 (7th Cir. 1977) (holding egg trade association's advertisements about the relationship between eggs and heart disease were commercial speech). Defendants' various claims—denying the adverse effects of cigarettes and nicotine in relation to health and addiction—constitute commercial speech. Defendants disseminate their fraudulent representations about the safety of their products, both in formats that do and those that do not explicitly propose a particular commercial transaction, in attempts to persuade the public to purchase cigarettes.

The fact that some—but certainly not all-of these advertisements involve Defendants as a group joined in advertising their common product, discuss cigarettes generically without specific brand names, or link cigarettes to an issue of public debate, does not change the commercial nature of the speech. *Bolger*, 463 U.S. at 66 n.13, 67-68, 103 S. Ct. 2875; *Nat'l Comm'n on Egg Nutrition*, 570 F.2d at 163. Moreover, the reality that these corrective statements may tangentially burden noncommercial speech does not render the statements unconstitutional. A burden on commercial speech, whether it be suppression or mandatory disclosure, only triggers a higher level of scrutiny if the commercial speech is "inextricably intertwined" with fully protected speech. *Riley*, 487 U.S. at 796, 108 S. Ct. 2667 ("[S]peech [does not] retain[ ] its commercial character when it is inextricably intertwined with otherwise fully protected speech."). Here, Defendants' past participation in the public controversy surrounding smoking and health may have been inextricably intertwined with their marketing efforts, but the intentionally fraudulent

character of the noncommercial public statements undermines any claim for more exacting scrutiny. *See McIntyre*, 514 U.S. at 357, 115 S. Ct. 1511. Moreover, because the injunctive order cannot retroactively burden Defendants' past communications, to determine the constitutionality of the corrective statements we must look to the future and evaluate whether the district court's order targeting commercial speech cuts too broad a swath.

The issue of corrective advertising's possible peripheral impact on protected speech does not affect the character of the burdened speech, but rather bears on whether the remedy is sufficiently narrowly tailored to achieve a substantial government interest—in this case, preventing Defendants from committing future RICO violations. We have no reason to think it is not. The district court found that, for over fifty years, Defendants violated RICO by making false and fraudulent statements to consumers about their products. *Philip Morris*, 449 F. Supp. 2d at 26-27. The court also found Defendants reasonably likely to commit similar violations in the future, *id.* at 908-15, and concluded the corrective statements were necessary to counteract these anticipated violations, *see id.* at 927 ("The injunctive relief sought here is narrowly tailored to prevent Defendants from continuing to disseminate fraudulent public statements and marketing messages by requiring them to issue truthful communications."). Thus, contrary to Defendants' argument, the publication of corrective statements addressing Defendants' false assertions is adequately tailored to preventing Defendants from deceiving consumers.

The district court has not yet determined the content of the corrective statements. *Id.* at 928. As the validity of its order relies on the commercial nature of the speech it burdens, the court must ensure the corrective disclosures are carefully phrased so they do not impermissibly chill protected speech. *Zauderer*, 471 U.S. at 651, 105 S. Ct. 2265. Consequently, the court must confine the statements to "purely factual and uncontroversial information," *id.*, geared towards thwarting prospective efforts by Defendants to either directly mislead consumers or capitalize on their prior deceptions by continuing to advertise in a manner that builds on consumers' existing misperceptions. *Warner-Lambert Co.*, 562 F.2d at 769 (concluding, due to Listerine's fifty year history of false advertisements, "advertising which fails to rebut the prior claims . . . [would] inevitably build[] upon those claims; continued advertising continues the deception, albeit implicitly rather than explicitly"). Assuming the corrective advertising once drafted meets these requirements, it is a permissible restraint on Defendants' commercial speech.

E. Intervention

Tobacco-Free Kids Action Fund and five other public health organizations intervened in both the trial and appeal in order to advocate additional remedies against Defendants. Defendants assert that the intervenors are not properly before the court because they do not have standing and do not have the ability to pursue remedies for RICO violations under the statute. Not surprisingly, the intervenors disagree. Before we address the merits of the intervenors' cross-appeal we must resolve the propriety of their intervention.

Section 1964(b) authorizes the Attorney General to "institute proceedings under" section 1964(a) for equitable remedies. 18 U.S.C. § 1964(b). Private parties, on the other hand, may seek relief under section 1964(c), which allows suits for damages. The statutory scheme does not directly provide private parties with a cause of action for equitable remedies. *Id.* § 1964(c). According to Defendants, the inability to bring an action under section 1964(a) precludes private intervention in a RICO suit instituted by the government under subsection (a) and permitting private intervenors would contravene congressional intent. *Id.* § 1964(a), (c).

Defendants are wrong. Under Federal Rule of Civil Procedure 24(a)(2), "the question is not whether the applicable law assigns the prospective intervenor a cause of action[, but] [r]ather . . . whether the individual may intervene in an already pending cause of action." *Jones v. Prince George's County*, 348 F.3d 1014, 1018 (D.C. Cir. 2003). Therefore, intervention of right only requires "an 'interest' in the litigation—not a 'cause of action' or 'permission to sue.'" *Id.* (citing FED. R. CIV. P. 24(a)(2)). Section 1964(b) reserves for the government the ability to "institute" a cause of action for equitable remedies, but does not bar a private person with a sufficient interest under Rule 24(a)(2) from intervening. Likewise, section 1964(c) designates that private parties may bring a cause of action to pursue damages for RICO violations, but does not prevent them from intervening in a governmental action seeking to "prevent and restrain" future violations. Even where Congress has explicitly excluded private persons from a particular statutory cause of action they may, if not demonstrably contrary to congressional intent, still intervene if (1) they satisfy standing and Rule 24(a) requirements and (2)

their intervention is "limited to the claims of illegality presented by the [government]." *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 537, 92 S. Ct. 630, 30 L. Ed. 2d 686 (1972) (finding a statute forbidding a particular party from bringing a cause of action may only be read to prohibit intervention by that party if intervention would frustrate Congress's reasons for barring that party from initiating the litigation in the first place). Outside the text of the statute, which is at best silent on this subject, Defendants offer no evidence Congress intended to prevent private organizations from intervening in section 1964(a) actions. Moreover, the intervenors assert no novel "claims of illegality," but merely seek to expand the remedies sought by the government.

Two considerations are left: whether the intervenors satisfy standing and Rule 24(a) requirements. In this circuit, because an intervenor "participates on equal footing with the original parties to a suit," a prospective intervenor must satisfy Article III standing requirements. *Bldg. & Constr. Trades Dep't v. Reich*, 40 F.3d 1275, 1282 (D.C. Cir. 1994); *see also Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 732-33 (D.C. Cir. 2003). In *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992), the Supreme Court enunciated a three-part test for standing: (1) injury-in-fact, (2) causation, and (3) redressability. *Id.* at 560-61, 112 S. Ct. 2130; *Transp. Workers Union of Am. v. Transp. Sec. Admin.*, 492 F.3d 471, 474 (D.C. Cir. 2007). On appeal, Defendants claim the intervenors fail on the first two prongs: injury and causation. According to Defendants, the intervenors' alleged injuries are "purely conjectural" and no causal connection exists between their injuries and possible ongoing or future RICO violations.

We conclude the intervenors present sufficient injuries directly caused by Defendants' RICO violations. The membership organizations aver, under the umbrella of associational standing, *see UAW v. Brock*, 477 U.S. 274, 281-82, 106 S. Ct. 2523, 91 L. Ed. 2d 228 (1986), their members suffered injury because Defendants exposed their children to predatory and misleading advertisements intended to entice the children to smoke. "[A] person who received 'a misrepresentation made unlawful under [statute] has suffered injury in precisely the form the statute was intended to guard against.'" *Public Citizen v. FTC*, 869 F.2d 1541, 1548 (D.C. Cir. 1989) (quoting *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373, 102 S. Ct. 1114, 71 L. Ed. 2d 214 (1982)). As we have discussed at length, through their deceptive marketing, Defendants committed various racketeering acts in order to defraud consumers, including acts that violated mail and wire fraud statutes. Intervenor membership organizations, therefore, suffered an injury-in-fact at the hands of Defendants every time Defendants intended to deceive a member or a member's child. As only one intervenor must have standing for us to consider their additional proposed remedy, we need not decide the standing issue as to the remaining intervening public health organizations. *McConnell v. FEC*, 540 U.S. 93, 233, 124 S. Ct. 619, 157 L. Ed. 2d 491 (2003).

Intervenors fulfill the Rule 24(a) requirements if they: (1) submitted a timely application to intervene, (2) "have an interest relating to the property or transaction which is the subject of the action," (3) are "so situated that the disposition of the action may, as a practical matter, impair or impede [their] ability to protect that interest," and (4) have an interest that the existing parties would not adequately represent. *Bldg. & Constr. Trades*

Dep't, 40 F.3d at 1282. The intervenors easily satisfy the first two prongs. Defendants do not contest the timeliness of the intervenors' application. And, by demonstrating Article III standing, the intervenors adduce a sufficient interest. *Fund for Animals*, 322 F.3d at 735. The latter prongs are also met. We agree with the district court that the intervenors needed to intercede to protect their interests as the government "substantially altered the scope of the remedies it [sought]" and "no longer share[d] the views of Intervenors as to how extensive the appropriate remedies should be." *United States v. Philip Morris USA Inc.*, No. 99-2496, 2005 WL 1830815, at *5, 2005 U.S. Dist LEXIS 16196, at *24-*25 (D.D.C. 2005). Accordingly, we conclude intervention was proper.

F. Cross-Appeal

The government and the intervenors bring a cross-appeal challenging the district court's denial of additional remedies they sought against Defendants. Specifically, they appeal from the district court's refusal of their proposed counter-marketing campaign, national smoking cessation program, youth smoking reduction plan, and monitoring scheme. They also appeal from the denial of their request for disgorgement, which we affirm as the law of the case. *See Disgorgement Opinion*, 396 F.3d 1190.

We review *de novo* the district court's legal conclusion that the government's proposed counter-marketing, smoking cessation, and youth smoking reduction remedies were beyond its authority to order. Under section 1964(a), the district court may craft only forward-looking remedies aimed at preventing and restraining

future RICO violations. *Id.* at 1198. Remedies "focused on remedying the effects of past conduct" or "awarded without respect to whether the defendant will act unlawfully in the future" are beyond the court's statutory jurisdiction. *Id.*

As the government suggests, the proposed counter-marketing and smoker cessation programs are closely related: they share the goal of reducing the number of smokers in America. The former would "requir[e] Defendants to fund a long-term, extensive, culturally-competent public education and counter-marketing campaign . . . aimed at diluting both the impact of Defendants' fraudulent statements and at undermining the efficacy of Defendants' marketing efforts towards youth." *Philip Morris*, 449 F. Supp. 2d at 936. The district court concluded that the counter-marketing campaign would "serve to reduce the number of youth smokers, reduce the number of addicted adult smokers in the future, and thereby potentially reduce the economic incentives for Defendants to continue their fraud." *Id.* Similarly, the smoker cessation program would require Defendants to fund a media campaign "to encourage smokers to seek assistance to quit smoking," a "national tobacco quitline network" to provide access to counseling and medication for quitting smoking, and research to improve "tobacco dependence interventions and physician and clinician training and education." *Id.* at 933. The government and intervenors offer two rationales for these programs.

First, they argue that each future sale of cigarettes to a smoker who became addicted in the past due to Defendants' fraud is a continuing effect of the past fraud, due to the nature of addiction. The government and in-

tervenors urge that, even if the court cannot order recovery of past profits gained by past deception, it can deny Defendants the continuing future profits flowing from their past misconduct; that is, the court may remedy the continuing effects of past illegal conduct because such a remedy is forward-looking and not measured by past conduct. This argument overlooks the explicit instruction of section 1964(a) that district courts may only order remedies "to prevent and restrain violations of [RICO]." 18 U.S.C. § 1964(a). Future cigarette sales, even to addicted smokers, are not by themselves RICO violations. The proposed remedies attempt to prevent and restrain future effects of past RICO violations, not future RICO violations, therefore they are outside the district court's authority under section 1964(a).

Even those courts that would allow some version of disgorgement under section 1964(a) recognize that the statute is limited to preventing future violations and does not extend to future effects flowing from past violations. *See, e.g., Richard v. Hoechst Celanese Chem. Group, Inc.*, 355 F.3d 345, 355 (5th Cir. 2003) ("Section 1964(a) establishes that equitable remedies are available only to prevent ongoing and future conduct."); *United States v. Carson*, 52 F.3d 1173, 1182 (2d Cir. 1995) ("[T]he jurisdictional powers in § 1964(a) serve the goal of foreclosing future violations, and do not afford broader redress."). Nor do the government's examples from antitrust lend support to their argument. *See, e.g., Ford Motor Co. v. United States*, 405 U.S. 562, 573, 92 S. Ct. 1142, 31 L. Ed. 2d 492 (1972) ("The relief in an antitrust case must be effective to redress the violations and to restore competition." (quotation marks omitted)); *United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 607, 77 S. Ct. 872, 1 L. Ed. 2d 1057 (1957) (ordering

the district court to determine "the equitable relief necessary and appropriate . . . to eliminate the effects of the acquisition offensive to the statute"). The condition of monopolization is itself a violation of the Sherman Act, 15 U.S.C. §§ 2, 3, therefore district courts may order remedies to cure the monopolizing effects of the forbidden anticompetitive combination or acquisition so as to prevent the continuing violation, *id.* § 4. The same is not true of RICO or the fraud statutes, under which any future violation would have to result from ongoing acts, not ongoing conditions.

The intervenors suggest that remedies aimed at helping addicted smokers quit would "divest" Defendants of the "fruits of [their] ill-gotten gains," which are addicted smokers and the money they continue to pay for Defendants' cigarettes. *Turkette*, 452 U.S. at 585, 101 S. Ct. 2524 (describing the civil RICO remedies as a whole, including treble damages). This rhetoric simply disguises the same argument about continuing effects of past violations. The very authorities upon which the intervenors rely establish only the statute's authorization to "order any person to divest himself of any interest . . . in any enterprise," 18 U.S.C. § 1964(a), by separating the RICO defendant from the RICO enterprise in order to prevent future violations. *See, e.g., United States v. Local 560 of Int'l Bhd. of Teamsters*, 780 F.2d 267, 295 (3d Cir. 1985) (removal of a union's corrupt executive board was an act of divestiture).

Second, the intervenors argue that the proposed counter-marketing and smoking cessation campaigns would eliminate Defendants' incentive to market their products fraudulently by shrinking Defendants' customer base. It may be, as one expert testified, that "re-

mov[ing] from the marketplace a population of consumers and potential consumers of defendants' products, namely children" and addicted smokers (the targets of the counter-marketing and smoking cessation campaigns), would eliminate rather than heighten Defendants' incentive to market to these groups. Bazerman Written Direct Examination at 65. But marketing to these groups is not in itself a RICO violation. Certainly, if Defendants have no incentive to advertise their products then they have no incentive to do so with fraudulent statements, but we reject general deterrence remedies aimed so wide of the statutorily-ordained mark. *Disgorgement Opinion*, 396 F.3d at 1200 (rejecting disgorgement even though it "may act to 'prevent and restrain' future violations by general deterrence insofar as it makes RICO violations unprofitable"). Under the intervenors' theory, any remedy that reduces Defendants' potential customer base in any manner would prevent and restrain RICO violations because Defendants would have less incentive to market their products and therefore potentially market with fraudulent statements. As the Second Circuit observed, this argument goes too far: a remedy "may not be justified simply on the ground that whatever hurts a civil RICO violator necessarily serves to 'prevent and restrain' future RICO violations. If this were adequate justification, the phrase 'prevent and restrain' would read 'prevent, restrain and discourage,' and would allow any remedy that inflicts pain." *Carson*, 52 F.3d at 1182. Such a remedy reaches beyond the bounds of section 1964(a), which authorizes the district court to order injunctions to prevent and restrain fraudulent statements about smoking and health and addiction, not to prevent Defendants from marketing and selling their products at all.

We note that in its brief the government offhandedly mentions an alternative narrower smoking cessation program that would be "calculated to address the number of smokers who would become addicted *after* the judgment, as a result of future fraud," and suggests this program would be a viable option even if we affirm the district court's denial of the original program. Gov. Br. 225. The district court did not address this alternative, and the government does not further describe it or direct us to where we may find it in the record, so we do not consider it.

Only the intervenors appeal from the district court's denial of the government's proposed "youth smoking reduction targets" plan. Under that proposal, the court would require Defendants to reduce youth smoking by six percent each year for seven years, and if Defendants fail to meet an annual target, the court would assess them a $3,000 fine for each youth above the target who continues to smoke, a figure representing the "lifetime proceeds a Defendant could expect to earn from making its brands appealing" to youth. *Philip Morris*, 449 F. Supp. 2d at 933-34. The district court denied this injunction because it was not tailored to prevent and restrain future RICO violations for at least two reasons. First, the RICO violation the court found with relation to youth marketing was not Defendants' "continuing efforts to market to youth but rather their false denials of those efforts." *Id.* at 932 n.91. The youth smoking reduction proposal was not aimed at preventing Defendants from denying their youth marketing efforts but rather at restraining Defendants from marketing and selling to youth. Second, the court agreed with expert testimony that the youth smoking reduction plan was an "outcome-based" remedy that "tie[s] financial assess-

ments to the outcome of youth smoking . . . rates[, which] may increase or decrease due to input factors beyond Defendants' control." *Id.* at 934. An injunction that would hold Defendants responsible for outcomes they could not control regardless of modifications in their behavior would not serve to prevent or restrain Defendants from committing future RICO violations.

The intervenors' argument in favor of the youth smoking reduction proposal is based on the incorrect assumption that the underlying RICO violation to be prevented and restrained is Defendants' youth marketing, rather than their false denials of their efforts to market to youth. As noted above, we need not decide whether such denials amounted to RICO violations. Even if they did, the district court correctly concluded that an injunction aimed solely at reducing youth smoking rates does not address the section 1964 goal of preventing and restraining the underlying RICO violation. The intervenors' argument is unavailing.

Finally, the district court denied the government's proposed monitoring scheme pursuant to *Cobell v. Norton*, 334 F.3d 1128 (D.C. Cir. 2003), because the scheme would "require delegation of substantial judicial powers to non-judicial personnel in violation of Article III of the Constitution." *Philip Morris*, 449 F. Supp. 2d at 935. In *Cobell*, we held that the district court lacked authority to appoint a monitor charged with "wide-ranging extrajudicial duties" to fill "an investigative, quasi-inquisitorial, quasi-prosecutorial role that is unknown to our adversarial legal system." *Cobell*, 334 F.3d at 1142. Although we acknowledged that a monitor may report on a defendant's "compliance with the district court's decree and . . . help implement that de-

cree," we held that the court could not invest the monitor with authority to direct a defendant "to take or to refrain from taking any specific action to achieve compliance" with the court's order or to adjudicate violations of the order as "a roving federal district court." *Id*. at 1143 (citations omitted). Our decision did not turn, as intervenors suggest, on the lack of a complex decree for the monitor to enforce. *See id*.

The government does not challenge the district court's legal conclusion that the government's proposed monitor possessed impermissibly broad powers. Rather, the government argues that the district court should have *sua sponte* created a modified version of the government's monitoring scheme that would not violate the principles of *Cobell*. In support, the government merely demonstrates that courts possess authority to appoint monitors (a proposition the district court did not dispute), and argues that a monitor is necessary in this case because of the complexity of the injunction and the intransigence of Defendants. These assertions do not demonstrate that the district court abused its discretion by deciding not to create its own monitoring scheme to replace the government's inappropriate proposal.

We therefore affirm the district court's denial of the government's proposed counter-marketing campaign, smoking cessation program, youth smoking reduction plan, and monitoring scheme.

* * *

For the foregoing reasons, we affirm the district court's judgment of liability in its entirety except as to CTR and TI, with regard to which we vacate the judgment and remand with directions to dismiss them from

the suit. We also largely affirm the remedial order, including the denial of additional remedies sought on cross-appeal, and remand to the district court regarding only four discrete issues. First, because we have no factual findings specific to BWH, we cannot determine whether it is reasonably likely to commit future violations; therefore, we remand that issue for further fact finding and clarification. Second, to the extent that it binds all Defendants' subsidiaries, we vacate the remedial order and remand to the district court for proceedings to determine whether inclusion of the subsidiaries, and which ones, satisfies Rule 65(d). Third, we vacate the prohibition on the use of health messages or descriptors and remand for the district court to reformulate that injunction so as to exempt foreign activities that have no substantial, direct, and foreseeable domestic effects. Finally, we also vacate the remedial order as it regards point-of-sale displays and remand for the district court to make due provision for the rights of innocent third parties and clarify that the order, if reinstated in any form, does not require duplicative displays.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 04-5252

UNITED STATES OF AMERICA, APPELLEE

v.

PHILIP MORRIS USA INC., ET AL., F/K/A
PHILIP MORRIS INCORPORATED, APPELLANTS

Feb. 4, 2005

OPINION

Before: SENTELLE and TATEL, Circuit Judges, and WILLIAMS, Senior Circuit Judge.

Opinion for the Court filed by Circuit Judge SENTELLE

Concurring opinion filed by Circuit Judge WILLIAMS.

Dissenting opinion filed by Circuit Judge TATEL.

SENTELLE, Circuit Judge.

A group of cigarette manufacturers and related entities ("Appellants") appeal from a decision of the District Court denying summary judgment as to the Government's claim for disgorgement under the Racketeer Influenced and Corrupt Organizations Act ("RICO" or "the Act"), 18 U.S.C. §§ 1961-68. The relevant section

of RICO, 18 U.S.C. § 1964(a), provides the District Courts jurisdiction only for forward-looking remedies that prevent and restrain violations of the Act. Because disgorgement, a remedy aimed at past violations, does not so prevent or restrain, we reverse the decision below and grant partial summary judgment for the Appellants.

I. Background

In 1999 the United States brought this claim against appellant cigarette manufacturers and research organizations, claiming that they engaged in a fraudulent pattern of covering up the dangers of tobacco use and marketing to minors. The Government sought damages under the Medical Care Recovery Act ("MCRA"), 42 U.S.C. §§ 2651-53, and the Medicare Secondary Payer ("MSP") provisions of the Social Security Act, 42 U.S.C. § 1395y to recover health-care related costs Appellants allegedly caused. The United States also claimed that Appellants engaged in a criminal enterprise to effect this cover-up, and sought equitable relief under RICO, including injunctive relief and disgorgement of proceeds from Appellants' allegedly unlawful activities. The Government sought this relief under 18 U.S.C. § 1964(a), which gives the District Court jurisdiction

> to prevent and restrain violations of [RICO] by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign

> commerce; or ordering dissolution or reorganization of any enterprise. . . .

18 U.S.C. § 1964(a).

Appellants moved to dismiss the complaint in 2000. The District Court did dismiss the MCRA and MSP claims, but allowed the RICO claim to stand. *United States v. Philip Morris, Inc.*, 116 F. Supp. 2d 131, 134 (D.D.C. 2000).

Section 1964(a) conferred jurisdiction on the District Court only to enter orders "to prevent and restrain violations of the statute." In considering whether disorgement came within this jurisdictional grant, the court relied on a decision of the Second Circuit, the only circuit then to have considered "whether . . . disgorgements . . . are designed to 'prevent and restrain' *future* conduct rather than to punish *past* conduct." *United States v. Carson*, 52 F.3d 1173, 1182 (2d Cir. 1995) (emphasis in original). After noting that "RICO has a broad purpose [and] the legislative history of § 1964 indicates that the equitable relief available under RICO is intended to be 'broad enough to do all that is necessary," *id.* at 1181, the *Carson* court went on to observe that it did not see how it could "serve[ ] any civil RICO purpose to order disgorgement of gains illgotten long ago. . . ." *Id.* at 1882. The portion of *Carson* relied upon by the District Court in the present controversy suggested that disgorgement *might* "serve the goal of 'preventing and restraining' future violations," but flatly held that the remedy would not do so "unless there is a finding that the gains are being used to fund or promote the illegal conduct, or constitute

capital available for that purpose."[1] *Id.* at 1182. The Second Circuit went on to caution that disgorgement would be better justified under this analysis where the "gains [were] ill-gotten relatively recently." *Id.* The District Court accepted the Second Circuit's suggested holding that the appropriateness of disgorgement depends on whether the proceeds are available for the continuing of the criminal enterprise, but ruled that the question was premature, and denied the motion for dismissal on the RICO-disgorgement claim. *Philip Morris*, 116 F. Supp. 2d at 151-52. Neither party sought leave to file an interlocutory appeal of that ruling.

The case proceeded, and the Government sought disgorgement of $280 billion that it traced to proceeds from Appellants' cigarette sales to the "youth addicted population" between 1971 and 2001. This population includes all smokers who became addicted before the age of 21, as measured by those who were smoking at least 5 cigarettes a day at that age.

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[1] While the *Carson* language may appear to be dicta, the Second Circuit remanded for determination of which disgorgement amounts were sufficiently directed to prevention and restraint to qualify under § 1964(a), thus treating the language on availability of disgorgement as essential to the outcome of the case, and therefore a holding. Some other courts have followed *Carson*. *See, e.g.*, *Richard v. Hoechst Celanese Chem. Group, Inc.*, 355 F.3d 345, 354 (5th Cir. 2003) (observing that "the Second Circuit noted that disgorgement is generally available under § 1964"); *United States v. Private Sanitation Indus. Ass'n*, 914 F. Supp. 895, 901 (E.D.N.Y. 1996) ("[T]he disgorgement in this case is clearly directed towards the prevention of future illegal conduct, and is therefore a permissible remedy for civil RICO violations under the limitations imposed by Carson.").

After discovery, Appellants moved for summary judgment on the disgorgement claim arguing that (1) disgorgement is not an available remedy under § 1964(a), (2) even if disgorgement were available, the Government's model fails the *Carson* test for permissible disgorgement that will "prevent and restrain" future violations, and (3) even if disgorgement were available, the Government's proposed model is impermissible because it includes both legally and illegally obtained profits in violation of *SEC v. First City Financial Corp.*, 890 F.2d 1215 (D.C. Cir. 1989). The District Court denied this motion in a memorandum order designated "#550." *United States v. Philip Morris USA, Inc.*, 321 F. Supp. 2d 72 (D.D.C. 2004). On motion of the defendants, the District Court certified Order #550 for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). That section provides for interlocutory appeal where a district judge has certified that "an order not otherwise appealable . . . involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of litigation. . . ." Under § 1292(b), the Court of Appeals may then decide whether to permit the appeal to be taken from such order. In the present case, we allowed the appeal.

II. Analysis

A. Scope of Review

At the outset, the Government urges that our review should be limited to the narrow question of whether the disgorgement it seeks is consistent with the standards of *Carson*, not whether disgorgement *vel non* is an available remedy under civil RICO. The Government bases this argument on the theory that the order on

appeal—that is the memorandum order denying "defendants' motion for partial summary judgment dismissing the Government's disgorgement claim"—was reiterating a prior order on the general question of availability of disgorgement. Further, the Government argues, the order spoke anew only to the measure of disgorgement, assuming such disgorgement to be otherwise available. In support of its proposed limitation of our review, the Government relies upon *Yamaha Motor Corp., USA v. Calhoun*, 516 U.S. 199, 116 S. Ct. 619, 133 L. Ed. 2d 578 (1996). In *Yamaha*, the Supreme Court dealt with the breadth of review properly conducted by a court of appeals under 28 U.S.C. § 1292(b). *Id.* at 204, 116 S. Ct. 619. The Government selectively quotes from *Yamaha* the sentence that, "The court of appeals may not reach beyond the certified order to address others made in the case." *Id.* at 205, 116 S. Ct. 619. Based on this sentence, the Government then argues that because the first order denying a motion to dismiss had dealt with the question of the availability of disgorgement, this certified interlocutory review of the subsequent summary judgment order is restricted to the new theory considered by the court on that occasion-that the disgorgement the Government pursued exceeded the standard available for such disgorgement as set by the Second Circuit in *Carson*.

Unfortunately for the Government's position, the *Yamaha* opinion did not end with the sentence upon which the Government relies. The Supreme Court went on to say in the same paragraph: "But the appellate court may address any issue fairly included within the certified order because 'it is the *order* that is appealable, and not the controlling question identified by

the district court.'" *Id.* (emphasis in original) (quoting 9 J. MOORE & B. WARD, MOORE'S FEDERAL PRACTICE § 110.25[1] at 300 (2d ed. 1995) and citing 16 C. Wright, A. Miller, E. Cooper, & E. Greshman, Federal Practice & Procedure § 3929 at 144-45 (1977)). Appellants' motion below was for "Summary Judgment Dismissing the Government's Disgorgement Claim," and granting this motion would have resulted in *complete dismissal* of the Government's claim for disgorgement with prejudice. *See* Appellee's App. at 19, 79. Thus the District Court's denial was on the question of whether disgorgement would be allowed *at all*, and we may review it as such regardless of the grounds the District Court gave for its decision. In the memorandum accompanying its denial of this motion, evidencing an accurate understanding of the summary judgment standard provided by Rule 56 of the Federal Rules of Civil Procedure, the District Court noted that "summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Philip Morris*, 321 F. Supp. 2d at 74 (citing FED. R. CIV. P. 56(c)). Significantly, the court further noted that "Defendants argue that any disgorgement which might be ordered upon a finding of liability must be limited by *both the text of Section 1964(a) itself and the holding* in United States v. Carson . . . interpreting that section." *Philip Morris*, 321 F. Supp. 2d at 74 (emphasis added). Thus the court clearly implied the possibility that none might be ordered, and that statutory issues outside *Carson* were before the court.

Our dissenting colleague argues that the availability of the disgorgement claim *vel non* is not before us because Appellants did not fully restate their earlier arguments in their motion, but only expressed their reservation in a footnote referencing the District Court's prior rejection of their position. While it is true, as our colleague reminds us, that we have held that a "litigant does not properly raise an issue by addressing it in a 'cursory fashion,' with only 'bare-bones arguments,'" *Cement Kiln Recycling Coalition v. EPA*, 255 F.3d 855, 869 (D.C.Cir. 2001) (per curiam), our prior holdings on that subject have been in very different contexts. In *Cement Kiln*, for example, and in *Wash. Legal Clinic for the Homeless v. Barry*, 107 F.3d 32, 39 (D.C. Cir. 1997), relied upon by the dissent, we were determining whether an issue was properly before us that had been raised in no other fashion. In the present case, we are reviewing a summary judgment decision, presumably according to the standards set forth by the Supreme Court in such decisions as *Yamaha*, and the issue in question was clearly decided by the District Court in the first rejection of the motion to dismiss. The issue was called to the attention of the second summary judgment order, now under direct review, and expressly pointed out in the footnote which our colleague disdains. Furthermore, the motion leading to the order presently before us sought summary judgment of dismissal of the disgorgement claim, not simply a limitation to such disgorgement as might have been supported by the *Carson* test or other factors. Given the Supreme Court's plain teaching in *Yamaha*, particularly its adoption from a learned treatise of the language "it is the order that is appealable, and not the controlling question identified by the district court," *Yamaha*, 516 U.S. at 205, 116 S. Ct. 619 (*see* other

authorities, *supra*), *Cement Kiln* and *Barry* have no applicability. *Yamaha* controls. We therefore proceed to review the denial of summary judgment, under the usually applicable standards, not simply the sole question to which the Appellees and the dissent would restrict us.

Our dissenting colleague suggests that we are limited by "our general policy of declining to consider arguments not made to the district court in the motion leading to the order under appeal." Dissent at 1211. We know of no such "general policy" that the particular issue addressed has to have been raised in the particular motion. Rather, we understand our general policy to be following the instructions of the Supreme Court that we are to "address any issue fairly included within the certified order." *Yamaha*, 516 U.S. at 205, 116 S. Ct. 619. Insofar as our colleague's differing understanding rests on *United States v. British Am. Tobacco (Invs.) Ltd.*, 387 F.3d 884, 892 (D.C. Cir. 2004) (citing *United States v. Hylton*, 294 F.3d 130, 135-36 (D.C. Cir. 2002)), cited by Dissent at 1213, we do not read that case as supporting a general policy that limits consideration to those arguments raised in the particular motion leading to the certified order, as opposed to being "fairly included" within that order, or even to address the point. The court in *British American Tobacco* held only that an intervenor that had raised a privilege issue with respect to an entire collection of documents at one stage of the litigation, but that failed to participate at all in later proceedings focused on one of the documents, despite having notice, had not adequately preserved its objection as to that single document. 387 F.3d at 887-88. It had nothing to do with the scope of review on an interlocutory appeal under

§ 1292(b). Neither it nor *Hylton* dealt in any fashion with the breadth of interlocutory review, nor was establishing any standard for the papers in which an argument must have been raised. Each rejected an attempt by an appellant to raise a new ground for the first time on appeal. Appellants before us raised and preserved their argument as set forth in the text above. We read nothing in *British American Tobacco* or *Hylton* to suggest a general policy barring our review under the *Yamaha* standard.

We find no history of such a general policy that would bar us from considering questions logically antecedent and essential to the order under review. Especially is this so given the Supreme Court's instructions in *Yamaha* that we are to "address any issue fairly included within the certified order." That must include at least issues that are logically interwoven with the explicitly identified issue and which were properly presented by the appellant. Even ignoring the apparent allusion to the broader issue of summary judgment preserved in the caption of the motion, the relief sought, and the footnote provided above, it is difficult to see how we could establish such a policy that would cause us to affirm a decision denying summary judgment when a ground compelling its grant is fairly encompassed within the order. Our colleague's interpretation of general policy would seem to compel us to return for trial a case before us for review of a denial of summary judgment, no matter how plain the absence of substantial question of material fact, on the grounds that the denial of summary judgment had been based on rejection of some other reasoning in a previous motion, even though the trial court had earlier erred in denying the first motion to dismiss—even when the appellant

had called that denial to the court's attention in the caption of its motion, and a proposed order accompanying the second motion.

Our dissenting colleague finds in *Yamaha* support for the proposition that "the only issues 'fairly included' within a certified order are those decided in the district court's accompanying memorandum. . . ." Dissent at 1213. We understand the law to be, as suggested in *Yamaha*, that issues are not decided in memoranda at all, but rather in orders. Therefore, consistent with *Yamaha*, we review orders, not memoranda. Our colleague asserts that in *Yamaha* the Court "found 'fairly included' an issue that the district court had resolved in the same opinion in which it decided the issue identified as the controlling question of law." Dissent at 1213. While this may well be the case, the Supreme Court not only did not stress that circumstance, it did not even mention it. Indeed, we note that our colleague had to repair to the unpublished opinion of the District Court to discover the truth of his proposition. We seriously doubt that the Supreme Court intended to establish a precedent that difficult to discover, let alone apply.

Nothing in *United States v. Stanley*, 483 U.S. 669, 107 S. Ct. 3054, 97 L. Ed. 2d 550 (1987), is to the contrary. The passage relied upon by our dissenting colleague to the effect that courts considering interlocutory appeals under § 1292(b) should "not consider matters that were ruled upon in other orders," *id.* at 677, 107 S. Ct. 3054, did not address a situation like the one before us. Here the order appealed from reiterated, and totally depended upon, an issue fairly encompassed within the motion before that court and the order now before us. In *Stanley*, the court of appeals undertook interlocutory review of an order dealing with one claim of a multi-

claim complaint. In that order, the district court had refused to dismiss a claim asserted under the authority of *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971). On appeal, the court of appeals not only affirmed the district court's conclusion as to the *Bivens* claim, but reached back in the record to order the district court to reinstate another claim for relief asserted under the Federal Tort Claims Act, 28 U.S.C. § 2671 *et seq.* In the present case, the disputed "prior order" had denied judgment of dismissal on the disgorgement claim. The order concededly before us denied judgment of dismissal on the same disgorgement claim. We see nothing in *Stanley* inconsistent with the later instruction in *Yamaha* recognizing our jurisdiction to "address any issue fairly included within the certified order." *Yamaha*, 516 U.S. at 205, 116 S. Ct. 619. We therefore proceed, obedient to our understanding of *Yamaha*, to review the order before us denying summary judgment.

We review an order denying summary judgment *de novo*. *Cicippio-Puleo v. Islamic Republic of Iran*, 353 F.3d 1024, 1031 (D.C. Cir. 2004). Obedient to *Yamaha*, we will review Order #550 denying summary judgment applying anew the standards of Rule 56, and will not simply review that part of the District Court's thinking directed to the applicability of the *Carson* standard or the consistency of the Government's proffers with that standard. Therefore, we must address the issue, logically prior to the *Carson* question, of whether disgorgement is available at all. We hold that the language of § 1964(a) and the comprehensive remedial scheme of RICO preclude disgorgement as a possible remedy in this case.

B. The Availability of Disgorgement

The Government argues that § 1964 contains a grant of equitable jurisdiction that must be read broadly to permit disgorgement in light of *Porter v. Warner Holding Co.*, 328 U.S. 395, 66 S. Ct. 1086, 90 L. Ed. 1332 (1946), and its progeny. The *Porter* Court considered reimbursement awards under the Emergency Price Control Act of 1942 ("EPCA") and concluded that where a statute grants general equitable jurisdiction to a court, "all the inherent equitable powers . . . are available for the proper and complete exercise of that jurisdiction." *Porter*, 328 U.S. at 398, 66 S. Ct. 1086. This grant is only to be limited when "a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction." *Id.* In this case the text and structure of the statute provide just such a restriction.

As the Supreme Court has repeatedly observed: "Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree." *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377, 114 S. Ct. 1673, 128 L. Ed. 2d 391 (1994) (citations omitted). Reading *Porter* in light of this limited jurisdiction we must not take it as a license to arrogate to ourselves unlimited equitable power. We will not expand upon our equitable jurisdiction if, as here, we are restricted by the statutory language, but may only assume broad equitable powers when the statutory or Constitutional grant of power is equally broad.

As our dissenting colleague correctly notes, the Court in *Porter* was considering whether a district court acting under the authority granted in the EPCA

had the authority to order restitution for overcharges. The implication of broad equitable authority in *Porter* came from a statute which empowered the district court to grant "a permanent or temporary injunction, restraining order, or other order." EPCA § 205(a), 56 Stat. 23, 33 (1942). The action before the Court in *Porter* was brought under a section providing that "the Administrator" could bring action against persons engaged in overcharges for "an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond." *Id.*

The Supreme Court did not have to make much of a stretch to determine that the phrase "enforcing compliance with such provision," and expressly referring to "a permanent or temporary injunction, restraining order, or other order," would include restitution for amounts collected exceeding the ceilings determined under the statute. The Government in the present case asks us to work a far greater expansion of the statutory grant enabling the District Court in a civil RICO action brought by the Government under § 1964(a). We further note that the Court in *Porter* was ordering restitution, under a statute designed to combat inflation. Restitution of overcharges works a direct remedy of past inflation, directly effecting the goal of the statute. The Court in *Porter* set forth two theories under which "[a]n order for the recovery and restitution of illegal rents may be considered a proper 'other order' " under the applicable statute. 328 U.S. at 399, 66 S. Ct. 1086. First, the recovery of the illegal payment by the victim tenant

"may be considered as an equitable adjunct to the injunction decree," as it effects "the recovery of that which has been illegally acquired and which has given rise to the necessity for injunctive relief." *Id.* (noting that "such a recovery could not be obtained through an independent suit in equity if an adequate legal remedy were available."). The equitable jurisdiction of the Court having been properly invoked, the Court then had the power "to decide all relevant matters in dispute and to award complete relief. . . ." *Id.* Also, and more to the point, the Court was authorized "in its discretion, to decree restitution of excessive charges in order to give effect of the policy of Congress." *Id.* at 400, 66 S. Ct. 1086. The policy of Congress under the EPCA was to prevent overcharges with inflationary effect. The goal of the RICO section under which the government seeks disgorgement here is to prevent or restrain future violations. We therefore must consider the forward-looking nature of the remedy in a way not applicable to a different remedy in *Porter* for the accomplishment of a different goal under a different statute.

Section 1964(a) provides jurisdiction to issue a variety of orders "to prevent and restrain" RICO violations. This language indicates that the jurisdiction is limited to forward-looking remedies that are aimed at future violations. The examples given in the text bear this out. Divestment, injunctions against persons' future involvement in the activities in which the RICO enterprise had been engaged, and dissolution of the enterprise are all aimed at separating the RICO criminal from the enterprise so that he cannot commit violations *in the future*. Disgorgement, on the other hand, is a quintessentially backward-looking remedy focused on remedying the effects of past conduct to

restore the status quo. *See, e.g., Tull v. United States*, 481 U.S. 412, 424, 107 S. Ct. 1831, 95 L. Ed. 2d 365 (1987). It is measured by the amount of prior unlawful gains and is awarded without respect to whether the defendant will act unlawfully in the future. Thus it is both aimed at and measured by *past* conduct.

The Government would have us interpret § 1964(a) instead to be a plenary grant of equitable jurisdiction, effectively ignoring the words "to prevent and restrain" altogether. This not only nullifies the plain meaning of the terms and violates our canon of statutory construction that we should strive to give meaning to every word, *see, e.g., Murphy Explor. & Production Co. v. United States Dept. of the Interior*, 252 F.3d 473, 481 (D.C. Cir. 2001), but also neglects Supreme Court precedent. In *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 488, 116 S. Ct. 1251, 134 L. Ed. 2d 121 (1996), the Court held that compensation for past environmental cleanup was ruled out by the plain language of the Resource Conservation and Recovery Act which authorized actions "to restrain" persons who were improperly disposing of hazardous waste. If "restrain" is only aimed at future actions, "prevent" is even more so.

Mitchell v. DeMario Jewelry, 361 U.S. 288, 80 S. Ct. 332, 4 L. Ed. 2d 323 (1960), relied on by the Government, is not to the contrary. The *Mitchell* case was brought under the Fair Labor Standards Act of 1938, 29 U.S.C. § 215, 52 Stat. 1060 (1938) ("FLSA"). In that action, the Government was invoking the court's jurisdiction to restrain violations of a section making it unlawful for a covered employer to discharge or discriminate against employees who had filed complaints or instituted actions under the FLSA. The Court reviewed the whole breadth of that broad Act to conclude

that the available remedies included not only injunction against further discrimination and mandatory injunctions of reinstatement, but also a "make whole" reimbursement for lost wages because of the discriminatory discharge. As in *Porter*, the Court reiterated that in equitable jurisdiction "[u]nless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction." *Mitchell*, 361 U.S. at 291, 80 S. Ct. 332 (quoting *Porter*, 328 U.S. at 398, 66 S. Ct. 1086). In the RICO Act, Congress provided a statute granting jurisdiction defined with the sort of limitations not present in the FLSA or the EPCA. The statute under which the Government sued Appellants, 18 U.S.C. § 1964(a), granted only the jurisdiction which we set forth above. The District Court, so far as is relevant to actions under that section, has jurisdiction only

> *to prevent and restrain* violations of [RICO] by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise. . . .

18 U.S.C. § 1964(a) (emphasis added). The order of disgorgement is not within the terms of that statutory grant, nor any necessary implication of the language of the statute.

In considering the broad language from *Porter* upon which our dissenting colleague relies for the proposition

that we should find disgorgement available because Congress has not taken it away, we note that the Supreme Court considered a similar argument in *Meghrig*. The High Court nonetheless limited the available remedies under CERCLA to those provided in the statute, declaring that

> where Congress has provided "elaborate enforcement provisions" for remedying the violation of a federal statute, as Congress has done with RCRA and CERCLA, "it cannot be assumed that Congress intended to authorize by implication additional judicial remedies. . . ."

516 U.S. at 487-88, 116 S. Ct. 1251 (quoting *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 14, 101 S. Ct. 2615, 69 L. Ed. 2d 435 (1981)).

In RICO, as in RCRA and in CERCLA, Congress has laid out elaborate enforcement proceedings. One of those proceedings is a government action brought under § 1964(a). That one does not provide for disgorgement. That one provides only for orders which "prevent or restrain" future violations. Disgorgement does not do that.

It is true, as the Government points out, that disgorgement may act to "prevent and restrain" future violations by general deterrence insofar as it makes RICO violations unprofitable. However, as the Second Circuit also observed, this argument goes too far. "If this were adequate justification, the phrase 'prevent and restrain' would read 'prevent, restrain, and discourage,' and would allow any remedy that inflicts pain." *Carson*, 52 F.3d at 1182.

The remedies available under § 1964(a) are also limited by those explicitly included in the statute. The

words "including, but not limited to" introduce a non-exhaustive list that sets out specific examples of a general principle. *See Dong v. Smithsonian Inst.*, 125 F.3d 877, 880 (D.C. Cir. 1997). Applying the canons of *noscitur a sociis* and *ejusdem generis*, we will expand on the remedies explicitly included in the statute only with remedies similar in nature to those enumerated. *See Wash. State Dep't of Soc. & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 384, 123 S. Ct. 1017, 154 L. Ed. 2d 972 (2003). The remedies explicitly granted in § 1964(a) are all directed toward future conduct and separating the criminal from the RICO enterprise to prevent future violations. Disgorgement is a very different type of remedy aimed at separating the criminal from his prior ill-gotten gains and thus may not be properly inferred from § 1964(a).

The structure of RICO similarly limits courts' ability to fashion equitable remedies. Where a statute has a "comprehensive and reticulated" remedial scheme, we are reluctant to authorize additional remedies; Congress' care in formulating such a "carefully crafted and detailed enforcement scheme provides strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly." *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 209, 122 S. Ct. 708, 151 L. Ed. 2d 635 (2002) (quoting *Mertens v. Hewitt Associates*, 508 U.S. 248, 251, 254, 113 S. Ct. 2063, 124 L. Ed. 2d 161 (1993)) (internal quotations omitted) (emphasis in original). RICO already provides for a comprehensive set of remedies. When Congress intended to award remedies that addressed past harms as well as those that offered prospective relief, it said as much. In a criminal RICO action the defendant must forfeit his interest in the

RICO enterprise and unlawfully acquired proceeds, and may be punished with fines, imprisonment for up to twenty years, or both. 18 U.S.C. § 1963(a). In a civil case the Government may request limited equitable relief under § 1964(a). Individual plaintiffs are made whole and defendants punished through treble damages under 18 U.S.C. § 1964(c). This "comprehensive and reticulated" scheme, along with the plain meaning of the words themselves, serves to raise a "necessary and inescapable inference," sufficient under *Porter*, 328 U.S. at 398, 66 S. Ct. 1086, that Congress intended to limit relief under § 1964(a) to forward-looking orders, ruling out disgorgement.

Congress' intent when it drafted RICO's remedies would be circumvented by the Government's broad reading of its § 1964(a) remedies. The disgorgement requested here is similar in effect to the relief mandated under the criminal forfeiture provision, § 1963(a), without requiring the inconvenience of meeting the additional procedural safeguards that attend criminal charges, including a five-year statute of limitations, 18 U.S.C. § 3282, notice requirements, 18 U.S.C. § 1963(*l*), and general criminal procedural protections including proof beyond a reasonable doubt. Further, on the Government's view it can collect sums paralleling-perhaps exactly-the damages available to individual victims under § 1964(c). Not only would the resulting overlap allow the Government to escape a statute of limitations that would restrict private parties seeking essentially identical remedies, *see Agency Holding Corp. v. Malley-Duff & Assoc., Inc.*, 483 U.S. 143, 156, 107 S. Ct. 2759, 97 L. Ed. 2d 121 (1987), but it raises issues of duplicative recovery of exactly the sort that the Supreme Court said in *Holmes v. Securities Investor Protection*

Corp., 503 U.S. 258, 269, 112 S. Ct. 1311, 117 L. Ed. 2d 532 (1992), constituted a basis for refusing to infer a cause of action not specified by the statute. Permitting disgorgement under § 1964(a) would therefore thwart Congress' intent in creating RICO's elaborate remedial scheme.

A note appended to the statute stating that RICO "shall be liberally construed to effectuate its remedial purposes" does not effect this structural inference. Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 904(a), 84 Stat. 947 (codified in a note following 18 U.S.C. § 1961). This clause may warn us against taking an overly narrow view of the statute, but "it is not an invitation to apply RICO to new purposes that Congress never intended." *Reves v. Ernst & Young*, 507 U.S. 170, 183, 113 S. Ct. 1163, 122 L. Ed. 2d 525 (1993). The text and structure of RICO indicate that those remedial purposes do not extend to disgorgement in civil cases.

The Second Circuit in *Carson* has interpreted "prevent and restrain" not to eliminate the possibility of disgorgement altogether, but to limit it to cases where there is a finding "that the gains are being used to fund or promote the illegal conduct, or constitute capital available for that purpose." *Carson*, 52 F.3d at 1182. The Fifth Circuit adopted this interpretation in a case holding that disgorgement after the defendant had ceased production of an allegedly defective product would be inappropriately punitive rather than directed toward future violations. *See Richard v. Hoechst Celanese Chemical Group*, 355 F.3d 345, 355 (5th Cir. 2003). While we avoid creating circuit splits when possible, in this case we can find no justification for considering any order of disgorgement to be forward-looking as re-

quired by § 1964(a). The language of the statute explicitly provides three alternative ways to deprive RICO defendants of control over the enterprise and protect against future violations: divestment, injunction, and dissolution. We need not twist the language to create a new remedy not contemplated by the statute.

Our colleague reminds us that the Supreme Court has instructed "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." Dissent at 1220 (quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484, 109 S. Ct. 1917, 104 L. Ed. 2d 526 (1989)). This would be most devastating to one side of the case or the other if we were in fact attempting to overrule a Supreme Court precedent. That is, if there were a Supreme Court case that had direct application to the facts before us, we would be required to follow it, and that would be the end of the matter. We would not need to consider any other line of cases. However, the *Rodriguez de Quijas* language is not particularly helpful when no precedent of the Supreme Court "has direct application," as in the present case. There is not a Supreme Court case dealing with the jurisdiction of a district court to order disgorgement under RICO § 1964(a). There is not a Supreme Court case discussing that question. There is, in short, no Supreme Court case having direct application. With no Supreme Court case having direct application, it is our duty to construe the statute. That is what we have done.

III. Conclusion

Because we hold that the District Court erred when it found that disgorgement was an available remedy under 18 U.S.C. § 1964(a), we reverse the District Court and grant summary judgment in favor of Appellants as to the Government's disgorgement claim.

WILLIAMS, Senior Circuit Judge, concurring.

I join the opinion for the court. I write separately to emphasize problems with the government's fallback interpretation of 18 U.S.C. § 1964(a), under which the government could obtain disgorgement for purposes of reducing the defendant's *ability* to commit future RICO violations, with the amount accordingly limited to assets "being used to fund or promote the illegal conduct, or [that] constitute capital available for that purpose." *United States v. Carson*, 52 F.3d 1173, 1182 (2d Cir. 1995). This superficially appealing interpretation in fact creates a kind of pushmi-pullyu, a beast that Congress is most unlikely to have ordained.

I.

The statute gives district courts "jurisdiction to prevent and restrain [RICO] violations." 18 U.S.C. § 1964(a). Reasoning that pure deterrence was an impermissible objective of orders under § 1964(a), the Second Circuit went on to find that disgorgement could "prevent and restrain" if limited to the amount of ill-gotten gains that were "being used to fund or promote the illegal conduct, or constitute capital available for that purpose." *Id.* at 1182. Because money is fungible, as indeed are virtually all resources when viewed as enablers of future criminal conduct, the government here refines its *Carson*-derived fallback position, quite sensibly rejecting any limitation to "ill-gotten gains" in

the form of specific money or resources so gained. Such a limit, we have said (applying a different statute), would lead to absurd results. *SEC v. Banner Fund International*, 211 F.3d 602, 617 (D.C. Cir. 2000). There the defendant proposed to confine disgorgement to the "actual assets" unjustly received. We said that what mattered was not the specific assets but the *amount* by which the defendant was unjustly enriched; the alternative would allow a defendant to escape liability by spending ill-gotten gains while husbanding other assets. *Id.* at 617. Thus the government's proposal is that the amount of the ill-gotten gains should set a ceiling on the disgorgement recovery, subject to the further limit mentioned above—essentially purporting to limit the disgorgement to crime-enabling resources, broadly construed.

In *Carson* itself the court ruled that this prevented the government from forcing disgorgement of funds, ill-gotten in the distant past, from a RICO defendant by then retired from the RICO enterprise itself (a union). In the context of corporate defendants such as those before us, a possible limit would be the entire net worth of the companies (a good deal less than the $280 billion that the government claims to have been ill-gotten gains). But perhaps not. Even that limit is arbitrary, as resources can be used for criminal purposes even if offset by company debt. Subject to the bankruptcy laws, nothing in the logic of the crime-enablement theory clearly calls for stopping at confiscation of the shareholders' interests; why not the bondholders' as well?

On the other side, it might be plausible under the *Carson* theory to exempt firm resources now devoted to non-tobacco enterprises. It is probably about as

difficult for these defendants to re-allocate resources from the businesses of cheese and crackers, for example, to criminality in the sale of cigarettes, as for the union in *Carson* to lure Carson and his funds back from retirement to union criminality.

In short, *Carson* and the government's fallback position send the court off on a virtually metaphysical quest to draw lines based on the likelihood that particular resources will be devoted to crime.

II.

It is hardly surprising that there are only gossamer lines between drastic disgorgement (destruction of bondholder as well as shareholder wealth) and relatively mild disgorgement (cordoning off resources in non-tobacco subsidiaries). The plain fact is that wealth deprivation is an extremely crude device for "prevent-[ing]" criminal behavior. Granted, a criminal miscreant with a billion dollars is potentially more dangerous than an impoverished criminal miscreant. But ordinarily the forces most affecting the likelihood of criminal action are, besides the actors' ethical standards and sense of shame, truly forward-looking conditions: the returns to crime versus the possible costs, all adjusted for risk (such as the risk of getting caught).

Confusion arises from an ambiguity in our understanding that, in the civil context, such remedies as damage awards and restitution "deter," and thus in a sense "prevent" commission of torts, breaches of contract, and other civil wrongs. It is quite true that a rule or practice of awarding such remedies deters, and thus prevents, such wrongs. Indeed, under one viewpoint that is the primary or even sole purpose of awarding such remedies. See William M. Landes & Richard A.

Posner, *The Economic Structure of Tort Law* (1987). But it is the *rule* or *practice* that creates the incentive. To make the rule credible, of course, the awards must be made; but no individual *award* has a material deterrent effect.

To evaluate that last statement consider a society that empowered some deus ex machina to randomly excuse one damage judgment in a million. Such an exception to the rules would have no detectable effect on the commission of torts or breaching of contracts. Even the lucky defendant who enjoyed the benefit of the pardon wouldn't—unless a complete fool—materially alter his future conduct because of that manna from heaven.

The equity court, empowered under § 1964(a) to "prevent and restrain" future violations, has before it the history of the defendant, including his past wrongs. It can decree relief targeted to his plausible future behavior. It can define the conditions bearing directly on that behavior. It can, for example, establish schedules of draconian contempt penalties for future violations, and impose transparency requirements so that future violations will be quickly and easily identified.

In assessing the likelihood that Congress intended an additional disgorgement remedy, it makes sense to inquire into the tendency of such an implied remedy to "prevent and restrain" future violations by the defendant. Of course the rule the government seeks here would be a rule, not merely a random extra penalty. But the question would be its incremental effect, on top of (1) RICO's explicit provisions for criminal penalties (including disgorgement and imprisonment under § 1963(a)) and for victim recoveries (trebled) under § 1964(c), and (2) the whole available panoply of genu-

inely forward-looking remedies—express controls over substantive conduct, transparency-enhancing orders, and contempt penalties for violations. It seems almost inconceivable that many aspiring criminals would find the incremental risk decisive. I find it hard to imagine a waffling villain—already in court for RICO violations—saying to himself: "Well, my chances of escaping § 1963(a) forfeiture and imprisonment because of the statute of limitations and the burden of proof, and of escaping treble damages under § 1964(c), and contempt penalties for violating the court's orders, still leave RICO violations attractive on a net basis; but that implied disgorgement under § 1964(a)—wow! Too much. It tilts me over the line."

The weakness of that scenario supports the inference that for the defendant who winds up before the equity court, Congress intended the words "prevent and restrain" to authorize only a tailored, forward-looking remedy. Penalties for violations of the court's decree, and transparency-enhancing measures meet that standard. A purported § 1964(a) disgorgement remedy, on top of those explicitly authorized, would provide only a trivial incremental effect (the reverse of the pardon granted once in a million), and would not qualify. Nor would disgorgement aimed at reducing the defendant's crime-enabling resources, a factor linked only crudely to his future tendency toward criminality.

Once we (1) accept the proposition that § 1964(a) limits the equity court to forward-looking remedies, as even the dissent appears to do with respect to the government's narrower argument, see Dissent at 1224-25 ("I also share the Second Circuit's apparent conclusion . . . that disgorgement may be ordered only to prevent and restrain *a defendant* from future RICO

violations."), and (2) reject the supposition that "whatever hurts a civil RICO violator necessarily serves to 'prevent and restrain' future violations," *Carson*, 52 F.3d at 1182, the court must try to draw lines between equitable remedies that merely "hurt" the defendant and ones that have a genuine tendency to "prevent and restrain" his future violations.

Because disgorgement under § 1964(a) so evidently lacks that tendency, the dissent relies on *Porter* and on the government's experts. *Porter* indeed includes the twice cited phrase suggesting that "[f]uture compliance may be more definitely assured if one is compelled to restore one's ill- gotten gains." Dissent at 1223, 1224. But the statute at issue in *Porter* gave district courts power to issue orders "enforcing compliance" and thus didn't seem to narrow the grant to forward-looking remedies. Indeed the *Porter* dissent never suggests such a limit; nor, so far as appears, did the defendant firm. For construing § 1964(a), *Porter* is of remarkably little help.

The expert testimony offered by the government for the proposition that backward-looking disgorgement will "'prevent and restrain' defendants from committing future RICO violations," see Dissent at 1226, serves no better. Obviously such testimony cannot alone resolve the issue, turning legal analysis of the statute into a fact battle among experts. Thus the experts' testimony is valuable for its analytic quality, not its utterance by a PhD.

The dissent's genuflection before the experts leaves the reader to imagine some supporting analysis. Lest the imagination run riot, I attach an appendix containing *all* of the expert testimony that the government saw fit to offer on the point in the summary judgment motion. The crux is Dr. Franklin Fisher's statement:

> [Defendants' experts] have also suggested that enjoining Defendants from future illegal behavior and threatening them with the possibility of financial penalties would be more effective as future deterrents than would be disgorgement. Professor Weil, for example, suggests that 'the Court could establish now a schedule of fines or punishments that it would levy should the Defendants engage in prohibited behavior.' These experts forget that laws prohibiting this behavior already exist and that, despite these laws and their associated remedies, the Defendants allegedly chose to engage in the illegal behavior. In this context, it is important to note that requiring Defendants to pay proceeds would strengthen the credibility of existing laws and thus provide additional economic incentives to deter future misconduct. [1]

While it is a nice rhetorical move to point out that the defendants violated RICO (as we must assume) despite existing sanctions, Fisher offers no analysis as to why the presence of a civil disgorgement remedy in favor of

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[1] United States Memorandum in Opposition to Defendants' Motion for Partial Summary Judgment Dismissing the Government's Disgorgement Claim, Appellee's Appendix at 813-14. Although Appellee's Appendix was filed under seal, the expert testimony presented to the court has also been posted by the government on its website.

the government would have reduced the likelihood of violations. (Indeed, on the government's theory—that the statute actually creates such a remedy—the defendants would have taken that into account in deciding to proceed with violations.) More important, Fisher looks at the *wrong* setting. *Before* this (or any) RICO litigation against a particular defendant, that defendant would have operated without the spotlight of the lawsuit itself. (That may explain why the government let the statute of limitations run for decades, and why the victims failed to seek treble damages.) Now the spotlight is on, and the plausible explanations for non-application of the explicit remedies (other than § 1964(a) equitable relief) have disappeared. And the district court can amplify the spotlight with transparency-enhancing and prior-approval measures. The real question is whether the imposition of this extra remedy on the defendants before the court—backward-looking civil disgorgement in favor of the government—would materially alter their readiness to persist in violations, in the face of all RICO's explicit remedies, and a forward-looking schedule of penalties for even minute infractions, made doubly effective by compulsory disclosure and approval measures. The government's experts simply did not address that question. This court's own analysis provides a clear answer that the extra "remedy" would not do so.

The dissent's use of the government's experts is part of its effort (in its qualified endorsement of the government's fallback position) to transform an issue of statutory interpretation into one of fact. See Dissent at 1222-23, 1227-28; see also *id.* at 1223 (noting that in *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 116 S. Ct. 1251, 134 L. Ed. 2d 121 (1996), there was no affirmative

evidence that the defendants were likely to commit future RCRA violations, and thus suggesting that the case was something other than pure statutory interpretation). But the "facts" hypothesized by the dissent are unrelated to the real world faced by RICO defendants —already arraigned for their past offenses and subject to a battery of new disincentives on top of all RICO's conventional explicit remedies. Statutory interpretation shouldn't turn on factual hypotheticals such as, "What if pigs had wings."

III.

The above analysis seems to me to confirm what intuition suggests about the jurisdictional issue in this case. Even the most narrowly formulated question about the validity of the district court's order—the choice between the government's primary position (that § 1964(a) creates unlimited discretion to order disgorgement) and its fallback position (that it provides authority to award crime-enabling disgorgement)—requires the court to plumb the meaning of § 1964(a). The issues in this case, all turning on the interpretation of § 1964(a)'s lone sentence, are so thoroughly enmeshed that we needn't explore the court's language limiting § 1292(b) jurisdiction to issues "logically interwoven" with the explicitly identified issue. Maj. Op. at 1196. The dissent's hypotheticals as to what might be covered, see Dissent at 1212, plainly depend on an astonishingly broad notion of either logic or weaving. Having analyzed § 1964(a) and having found the order in conflict with its terms, the court must reverse.

One final note. The dissent chides the court for creating a circuit split. See Dissent at 1208. But if we confined ourselves to what the dissent acknowledges to be properly before us, and adopted the dissent's

preferred position (that disgorgement is available like any other equitable remedy, regardless of its likely effects on a defendant's future behavior, simply because RICO doesn't explicitly preclude it), we would create no less of a split between this circuit and the Second.

Appendix

Excerpt from United States Memorandum in Opposition to Defendants' Motion for Partial Summary Judgment Dismissing the Government's Disgorgement Claim, Appellee's Appendix at 812-14.

B. *Disgorgement Provides Economic Incentives That Will Prevent Further RICO Violations*

172. Despite the fact that it is not necessary for the United States to prove this, disgorgement will prevent and restrain further bad acts.

173. Drs. Fisher and Kothari have both stated in their expert reports and deposition testimony, that disgorgement of the proceeds calculated by Dr. Fisher would in fact act to prevent and restrain future RICO violations. Dr. Fisher directly addressed this point in his rebuttal report in which he states:

> Defendants' experts have suggested that disgorgement of ill-gotten gains such as the proceeds sought in this matter will not serve the goal of preventing or restraining the defendants from engaging in similar bad acts in the future. For example, Professor Carlton argues, "Having to disgorge past proceeds, by itself, would not affect a defendant's incentives to engage in misconduct in the future because it would not affect the returns (if any) from future misconduct." I address these criticisms with well-known economic principles. What Professor

> Carlton and the other defendants' experts who espouse this view fail to recognize is that requiring defendants to pay proceeds will affect their expectations (and those of others contemplating malfeasance) about the returns from future misconduct. As a matter of economic principle, the higher the proceeds amount, the lower the expected returns from future misconduct and the greater the desired effect of deterrence.

Expert Rebuttal Report of Franklin Fisher, *United States v. Philip Morris*, (R. 1450; filed July 24, 2002) at 4-5 ¶ 12.

174. Dr. Kothari's expert report confirms Dr. Fisher's conclusion:

> Requiring the defendants to pay ill-gotten proceeds is relevant. The economic incentive for illegal behavior is higher (for defendants and onlookers) if defendants are not required to pay the proceeds. While payment of proceeds has some of the features of sunk cost, it is not identical to a sunk cost because it will affect future decisions or behavior. The higher the proceeds paid the greater the economic incentive to avoid illegal behavior in the future.

Expert Report of S.P. Kothari, *United States v. Philip Morris*, (R. 1451; filed July 24, 2002) at 3-4, ¶ 8.

175. Dr. Fisher expressly states in his expert report:

> [Defendants' experts] have also suggested that enjoining Defendants from future illegal behavior and threatening them with the possibility of financial penalties would be more effective as future deterrents than would be disgorgement. Professor Weil, for example, suggests that 'the Court could

> establish now a schedule of fines or punishments that it would levy should the Defendants engage in prohibited behavior.' These experts forget that laws prohibiting this behavior already exist and that, despite these laws and their associated remedies, the Defendants allegedly chose to engage in the illegal behavior. In this context, it is important to note that requiring Defendants to pay proceeds would strengthen the credibility of existing laws and thus provide additional economic incentives to deter future misconduct.

Expert Rebuttal Report of Franklin Fisher, *United States v. Philip Morris*, (R. 1450; filed July 24, 2002) at 5-6, ¶ 14.

176. Dr. Fisher has repeatedly confirmed the preventative benefit of disgorgement. At his deposition he stated:

> Q. . . . the idea is that disgorgement prevents and restrains future violations by altering the defendants' expectations about the returns they might receive from future misconduct. Is that right?
>
> A. . . . I believe that to be correct.
>
> Q. Does disgorgement prevent and restrain future RICO violations in any other way?
>
> A. Well, it removes at least some, and possibly all, of the assets with which to engage in future illegal activities.

Deposition of Franklin Fisher, *United States v. Philip Morris*, September 12, 2002, 828:4-19 (Exhibit 77).

177. "[A]s I have repeatedly and clearly stated in my report and deposition testimony, disgorgement of Defendants' proceeds, as I have calculated them, would in fact act to prevent and restrain future RICO violations." Declaration of Franklin Fisher, *United States v. Philip Morris*, at 7, ¶ 16 (Master Rule 7.1/56.1 St. Exhibit 5)

TATEL, Circuit Judge, dissenting.

Congress passed the Organized Crime Control Act of 1970, which included RICO, "to seek the eradication of organized crime in the United States . . . by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime." *United States v. Turkette*, 452 U.S. 576, 589, 101 S. Ct. 2524, 69 L. Ed. 2d 246 (1981) (quoting Pub. L. No. 91-452, 84 Stat. 922, 923 (1970)). Through this lawsuit, the United States seeks to end what it perceives as rampant racketeering violations within the tobacco industry. Specifically, the government offers voluminous evidence, which we must view in the light most favorable to it, *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986) (stating that at summary judgment the "evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in [its] favor"), that Philip Morris, Altria Group, R.J. Reynolds, Brown & Williamson, Lorillard, BATCo, and Liggett have engaged in a half century of deceptive practices to the detriment of the health—and lives—of their customers. Acting both individually and in concert through collective agreements and jointly funded organizations like the Council for Tobacco Research and the Tobacco Institute (also defendants), these companies publicly defended smoking as both harmless and nonaddictive despite knowing

from internal research that it was neither. In their advertising campaigns the companies targeted young people, who "often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them," *Bellotti v. Baird*, 443 U.S. 622, 635, 99 S. Ct. 3035, 61 L. Ed. 2d 797 (1979), despite publicly claiming otherwise.

The government alleges that during the course of this behavior, the defendants committed over ninety racketeering violations between RICO's 1970 effective date and the government's 1999 complaint. Significantly for this appeal, the government further claims that absent court intervention and despite the master settlement agreement between the tobacco companies and the states, the companies are likely to continue their deceptive practices and commit further racketeering violations in the future. The government's claim regarding likely future conduct rests not only on the companies' alleged history of deceptive activities, but also on record evidence that the companies continue making their misleading statements about both the health consequences of smoking and the addictive nature of nicotine, as well as persisting in their marketing efforts aimed at young people. The government asks the district court to enjoin the tobacco companies from future unlawful conduct and to order them to disgorge the profits they have earned due to their racketeering violations since RICO's effective date—profits the government estimates amount to $280 billion.

In now holding that district courts may never order disgorgement as a remedy for RICO violations, this court ignores controlling Supreme Court precedent, disregards Congress's plain language, and creates a circuit split—all in deciding an issue not properly before

us. Because the tobacco companies ask us to address an issue not fairly included in the certified order and not presented at that time to the district court, I would dismiss this interlocutory appeal. Were it appropriate to reach the merits, I would uphold the district court's denial of summary judgment on either of two grounds. First, unless "a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity," district courts may grant any equitable relief. *Porter v. Warner Holding Co.*, 328 U.S. 395, 398, 66 S. Ct. 1086, 90 L. Ed. 1332 (1946). Because under a fair application of Supreme Court precedent, *see id.* at 398-403, 66 S. Ct. 1086, no such inference can be drawn about RICO, I would conclude that the district court has authority to order disgorgement. Alternatively, even if RICO's phrase "prevent and restrain violations," 18 U.S.C. § 1964(a), limits the district court's equitable jurisdiction, I would still uphold the denial of summary judgment because the government has presented evidence that disgorgement will accomplish just that purpose in this case.

I.

Under 28 U.S.C. § 1292(b), if a district court "shall be of the opinion that [an] order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation," it may certify the order for interlocutory review, and the court of appeals "may thereupon, in its discretion, permit an appeal to be taken from such order." Section 1292(b) establishes a "two-tiered arrangement." *Swint v. Chambers County Comm'n*, 514 U.S. 35, 47, 115 S. Ct. 1203, 131 L. Ed. 2d 60 (1995). Congress "chose to confer on district courts

first line discretion to allow interlocutory appeals," *id.*, and "even if the district judge certifies the order under § 1292(b), the appellant still has the burden of persuading the court of appeals that exceptional circumstances justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment," *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 475, 98 S. Ct. 2454, 57 L. Ed. 2d 351 (1978) (internal quotation marks and citation omitted). In accepting this interlocutory appeal, this court not only (at the least) pushes the bounds of its jurisdiction, but also exercises its discretion on behalf of defendants whose litigating tactics leave much to be desired.

A.

In 2000, the tobacco companies—usually referred to in this opinion as "Philip Morris"—filed a motion to dismiss, arguing (among other things) that "disgorgement . . . is never available under a civil RICO count." *See United States v. Philip Morris Inc.*, 116 F. Supp. 2d 131, 150 (D.D.C. 2000). Denying that motion, the district court held that disgorgement could be available under 18 U.S.C. § 1964(a), but did not address whether disgorgement would be available in this particular case. *See id.* at 150-52. Philip Morris never sought certification of that order, though it could have done so at any time after the order's issuance. *See* Fed. R. App. P. 5(a)(3) (providing that the time for filing an appeal runs from when the district court amends the order to include certification, not from the issuance of the actual order); 16 Wright, Miller & Cooper, *Federal Practice and Procedure* § 3929 (2d. ed. 1996) ("This latitude [in Rule 5(a)] makes it possible to employ § 1292(b) with some precision, deferring the question of appeal until it is clear that prompt appeal is apt to be useful.").

In 2004, Philip Morris sought summary judgment regarding the government's request for disgorgement in this case. Contrary to the court's statement, *see* majority op. at 1193, Philip Morris neither reargued the position it took in 2000 nor asked the district court to revisit its 2000 decision. Philip Morris's only reference to its prior position came in a one-sentence footnote: "As noted previously, Defendants respectfully disagree with the Court and maintain that disgorgement in any fashion is unavailable to the Government in a civil RICO action." Defs.' Br. in Supp. Mot. Partial Summ. J. at 6 n.4. Instead, Philip Morris urged the court to grant its motion for summary judgment for two primary reasons. First, relying on *United States v. Carson*, where the Second Circuit held that district courts may order disgorgement as a RICO remedy only where the gains "are being used to fund or promote the illegal conduct, or constitute capital available for that purpose," *id.* at 20 (quoting *United States v. Carson*, 52 F.3d 1173, 1182 (2d Cir. 1995)), Philip Morris claimed that 18 U.S.C. § 1964(a) "limits disgorgement to the amount of ill-gotten gains that remain available to defendants to fund future RICO violations," *id.* Philip Morris further argued that "the Government deliberately has refused to develop the proof properly required under *Carson*" and this in turn "requires dismissal of the Government's disgorgement claim." *Id.* at 25. Second, Philip Morris asserted that the government's disgorgement model fails as a matter of law to reasonably approximate the defendants' ill-gotten gains.

The district court rejected both arguments and denied summary judgment to Philip Morris. *United States v. Philip Morris USA, Inc.*, 321 F. Supp. 2d 72 (D.D.C. 2004). Interpreting section 1964(a) more

broadly than had the Second Circuit, the court concluded that it could order disgorgement in situations besides those identified in *Carson*. *Id.* at 77-79. Unsurprisingly, the district court did not revisit its 2000 decision, observing only (in a footnote) that this decision had held "that disgorgement is a permissible remedy under Section 1964(a)." *Id.* at 76 n.7. The district court also rejected Philip Morris's contention regarding the government's disgorgement model. *Id.* at 81-82.

Philip Morris then asked the district court to certify its 2004 order under section 1292(b). In its certification request, Philip Morris did not reassert its legal argument from 2000. Instead, it stated that "[w]hether the *Carson* standard applies to the Government's disgorgement claim is clearly a controlling question of law. . . . If the Government is wrong, and *Carson* applies, nothing is left of its claim in this case." Def's Br. Supp. Mot. Certify Order # 550 for Interloc. App. at 4.

The district court agreed that a controlling question of law existed as to whether "the disgorgement allowed under 18 U.S.C. § 1964(a) is limited to those ill-gotten gains which are 'being used to fund or promote the illegal conduct or constitute capital available for that purpose.'" *United States v. Philip Morris USA, Inc.*, No. 99-2496, slip op. at 2-4, 2004 WL 1514215 (D.D.C. June 25, 2004) (quoting *Carson*, 52 F.3d at 1182). Although in its 2004 order the district court had rejected *Carson*'s interpretation of section 1964(a), it found substantial ground for difference of opinion on this issue, explaining that "it is obvious that the arguments to the contrary in *Carson* are neither insubstantial nor frivolous," and certified the 2004 order. *Id.* at 4, 7.

In its initial petition urging this court to accept the interlocutory appeal, Philip Morris never raised the

broader question the district court had addressed in 2000, i.e., whether disgorgement is ever available under section 1964(a). Instead, Philip Morris focused on the narrower issue actually raised in its 2004 motion for summary judgment, arguing that the district court had erred in rejecting *Carson*'s interpretation of section 1964(a) and claiming that "[i]f this Court agrees with the Second Circuit in *Carson*, its decision on appeal would dispose of the Government's disgorgement claim." Emergency Pet. for Permission to Appeal an Order at 9. The government opposed Philip Morris's section 1292(b) petition, arguing that a host of factual issues would require resolution regardless of whether this court adopted *Carson*'s or the district court's interpretation of section 1964(a) and thus that "interlocutory appeal would not materially advance the termination of this litigation." Resp. in Opp'n to Emergency Pet. at 15.

Responding to the government's opposition, Philip Morris suddenly changed tack and brought in play the issue decided in 2000. Philip Morris wrote:

> The district court rejected [the government's] argument [that an interlocutory appeal would not materially advance the litigation's termination] as a reason not to permit an appeal, and this Court should as well.
>
> First, and most obviously, if this Court reverses the district court's ruling that 'disgorgement is a permissible remedy under section 1964(a),' (Summary Judgment Order at 8 n.7), then the Government's $280 billion claim is precluded as a matter of law.

Reply to Emergency Pet. for Permission to Appeal an Order at 5. This entirely disingenuous statement conveyed the impression that the district court had *ruled* on this broader issue in the certified 2004 order rather than simply mentioning its 2000 decision. Moreover, by placing this statement under the heading "The District Court Properly Determined That an Appeal From Its Order Would Materially Advance This Litigation," *id.*, Philip Morris insinuated that the district court had certified *this* issue to this court as opposed to the narrower question actually resolved in the 2004 order. The government, of course, had no opportunity to correct these misrepresentations, and a motions panel accepted Philip Morris's appeal, expressly leaving the merits panel free to reconsider and dismiss the appeal. *In re Philip Morris USA, Inc.*, No. 04-8005 (D.C. Cir. July 15, 2004).

Philip Morris's opening brief on the merits reveals the scope of its bait and switch. The brief devotes forty pages to the issue decided in the 2000 order and only seven to the issues decided in the certified 2004 order. In response, the government urges us to dismiss the appeal entirely, suggesting that we lack jurisdiction over the issue decided in the 2000 order and observing that "Defendants' tactics subvert the mechanism for appeal established by section 1292(b)." Appellee's Br. at 45-46.

B.

As the foregoing discussion indicates, Philip Morris asks us—and the court now agrees—to decide an issue (1) not briefed in the motion leading up to the certified order, (2) not decided in the district court's opinion accompanying the certified order, (3) not raised by Philip Morris in its request for certification, (4) not

discussed in the order granting certification, (5) not raised by Philip Morris in its section 1292(b) petition before this court, and (6) decided in an entirely different order which Philip Morris could at any time have asked the district court to certify. This presents serious questions on two separate fronts: our jurisdiction over this appeal under section 1292(b), and our general policy of declining to consider arguments not made to the district court in the motion leading to the order under appeal. Unlike the court, I cannot brush these concerns aside.

Regarding our jurisdiction under section 1292(b), the Supreme Court has made clear that an appellate court can review "any issue fairly included within the certified order" because "[a]s the text of § 1292(b) indicates, appellate jurisdiction applies to the *order* certified to the court of appeals, and is not tied to the particular question formulated by the district court." *Yamaha Motor Corp., USA v. Calhoun*, 516 U.S. 199, 205, 116 S. Ct. 619, 133 L. Ed. 2d 578 (1996) (holding that where the district court decided two issues in the certified order but identified only the damages issue as the controlling question of law, the court of appeals could nonetheless address the other issue). But the "court of appeals may not reach beyond the certified order to address other orders made in the case." *Id.*; *see also United States v. Stanley*, 483 U.S. 669, 677, 107 S. Ct. 3054, 97 L. Ed. 2d 550 (1987) (holding that the court of appeals erred in addressing a claim not raised in the certified order though closely related to it). Both "[c]ommentators and courts have consistently observed that 'the scope of the issues open to the court of appeals is closely limited to the order appealed from [and][t]he court of appeals will not consider matters that were

ruled upon in other orders.'" *Stanley*, 483 U.S. at 677, 107 S. Ct. 3054 (quoting 16 Wright, Miller, Cooper & Gressman, *Federal Practice and Procedure* § 3929 (1977)) (second and third alterations in original).

This case falls near the intersection of these commands. For all intents and purposes, Philip Morris asks us to address the 2000 order. Today's decision overturns that order. This court has jurisdiction to do this under *Yamaha* only if the issue addressed in the 2000 order is "fairly included within the certified order." Taking a broad view of "fairly included," the court concludes that because the 2004 order denies dismissal of the government's disgorgement claim, we may review (at a minimum) any basis for summary judgment that is "logically interwoven with the explicitly identified issue." *See* majority op. at 1196. This approach not only gives us jurisdiction over the issue decided by the district court in the 2000 order, but also over the district court's 2002 determination, made in denying Philip Morris's motion for a jury trial, that disgorgement is an equitable remedy rather than a legal one, *United States v. Philip Morris, Inc.*, 273 F. Supp. 2d 3, 8-11 (D.D.C. 2002). I ndeed, although the concurrence apparently does not share this approach, *see* sep. op. at 1206 (Williams, J., concurring), the majority opinion suggests that any issue which would result in "*complete dismissal* of the Government's claim for disgorgement with prejudice" lies within our jurisdiction "regardless of the grounds the District Court gave for its decision," *see* majority op. at 1194. By this logic, we may also have interlocutory jurisdiction to review the district court's denial of the tobacco companies' 2000 motion to dismiss, where they claimed that the government has not "adequately alleged that Defendants' racketeering

activity will continue into the future," 116 F. Supp. 2d at 147-50, and even the district court's denial of Liggett's 2000 motion to dismiss, where the company argued that (as to it) the government could not show two elements required for a RICO claim, *id.* at 152-53. Because victory for the tobacco companies on the first issue (and, for Liggett, victory on the second) could also trigger dismissal of the government's disgorgement claims, under the court's theory our interlocutory jurisdiction may extend to these issues as well.

The court's approach is problematic in several respects. Most significantly, it curtails the district court's section 1292(b) certification role. In this case, the district court had neither an opportunity to exercise "first line discretion to allow interlocutory appeal[ ]," *Swint*, 514 U.S. at 47, 115 S. Ct. 1203, on the broader issue resolved in its 2000 order nor notice that Philip Morris would raise this issue with us. In future cases, district courts will lose their flexibility to certify discrete issues for review, since the certification of one order may give this court jurisdiction over all sorts of prior orders. Today's situation illustrates this: under the court's theory, we have jurisdiction in this interlocutory appeal to review at a minimum two prior orders, neither of which Philip Morris sought to certify. Moreover, by reducing the opportunity for tailored review, the court's jurisdictional theory threatens this circuit with interlocutory overload. Parties who persuade us to accept an interlocutory appeal may feel encouraged to raise any or even all issues decided in prior orders that fall within our newfound jurisdiction especially since, according to the court, issues raised in prior orders are "preserved" for section 1292(b) purposes, *see* majority

op. at 1196, and not simply for the purpose of appeal after final judgment.

By contrast, no harm of consequence would result from holding, as I would, that the only issues "fairly included" within a certified order are those decided in the district court's accompanying memorandum—exactly the situation with the issue reached by the Supreme Court in *Yamaha*, 516 U.S. at 203-05, 116 S. Ct. 619. There, the Court found "fairly included" an issue that the district court had resolved in the same opinion in which it decided the issue identified as the controlling question of law, *see Calhoun v. Yamaha Motor Corp., USA*, No. 90-4295, 1993 WL 216238 (E.D. Pa. June 22, 1993). While the Court did not explicitly rely on this point, it is relevant to determining whether *Yamaha*'s "fairly included" language stands for the proposition that appellate courts have interlocutory jurisdiction over all possible bases for reversing a summary judgment denial (as my colleagues read it) or only over bases which the district court considered and resolved in this denial (as I read it).

My approach, moreover, respects the Court's instruction in *Stanley* that we should "not consider matters that were ruled upon in other orders." 483 U.S. at 677, 107 S. Ct. 3054 (citation omitted); *cf. Briggs v. Goodwin*, 569 F.2d 10, 25 (D.C. Cir. 1977) (noting that any possible justification for addressing "all other issues relevant to the result reached by [a certified] order" would "be substantially diminished . . . where the order certified for appeal is a separate order from the one [containing the other issues]"); *Dinsmore v. Squadron, Ellenoff, Plesent, Sheinfeld & Sorkin*, 135 F.3d 837, 840 (2d Cir. 1998) (finding that the certified order referred to rather than incorporated a prior order and concluding that no

interlocutory jurisdiction existed over the issue decided in the prior order). It is thus hardly surprising that the court today points to no case in which an appellate court has exercised interlocutory jurisdiction over an issue decided in a different order from the one under certification. True, under my approach a party seeking an interlocutory appeal on a matter split across two orders would need to seek certification of both orders to bring the matter fully to this court. But that seems a small burden. If the party fails to make this effort (as in this case) and we conclude that it would be inappropriate to address only the issues raised in the certified order (as I would here), then we have discretion under section 1292(b) to refuse to permit the interlocutory appeal altogether—a point this court overlooks.

In addition to resting on a dubious interpretation of section 1292(b), the court's decision to review the broader issue runs counter to this circuit's general rules regarding waiver. Parties may raise here only those arguments they presented to the district court in their papers seeking (and opposing) the order under review, since only in exceptional circumstances will we consider an argument not made to the district court. *See United States v. British Am. Tobacco (Invs.) Ltd.*, 387 F.3d 884, 887-88 (D.C. Cir. 2004) (finding waiver based on a party's failure to appear and defend a privilege claim in the proceedings resulting in the interlocutory appeal, even though the party had asserted the privilege in a related proceeding in the same case); *see also id.* at 892 (refusing to consider argument not raised below) (citing *United States v. Hylton*, 294 F.3d 130, 135-36 (D.C. Cir. 2002)). Here, as discussed earlier, Philip Morris never argued the broader issue in the relevant pleadings; a sentence-long footnote stating "respectful disagree-

ment" is not an argument, particularly when offered in such a cursory fashion. *Cf., e.g., Cement Kiln Recycling Coalition v. EPA*, 255 F.3d 855, 869 (D.C. Cir. 2001) (per curiam) (observing that a "litigant does not properly raise an issue by addressing it in a 'cursory fashion' with only 'bare-bones arguments'"); *Wash. Legal Clinic for the Homeless v. Barry*, 107 F.3d 32, 39 (D.C. Cir. 1997) (declining to address argument made in a footnote). Although it is true, as the court points out, that in the two just-cited cases the issues were apparently never raised at an earlier stage, here we are reviewing not the entire case but only the certified 2004 order, which sets the bounds of both our jurisdiction and waiver doctrine. Moreover, while we sometimes make exceptions to our waiver rules, I would not do so here given Philip Morris's questionable tactics. Even under my colleagues' jurisdictional theory, only by exercising our discretion to accept an argument not raised in the district court—and further exercising our discretion to accept the interlocutory appeal—does the broader issue stand before us.

In sum, whether viewed in terms of jurisdiction or waiver, only Philip Morris's narrower challenge is properly before us. True, this means we should dismiss the appeal altogether, as it makes little sense to decide the narrower question at this time when the broader question might be appealed later. But Philip Morris itself created this problem. It had several ways it could properly have brought the broader issue to our attention. In its 2004 motion for summary judgment, it could have reargued the broader question and asked the district court to reconsider its decision; the district court's denial of reconsideration would have brought the issue fairly into the challenged order. Even more

appropriately, Philip Morris could have asked the district court to certify both the 2000 and 2004 orders and candidly explained that it wished this court to review the earlier order as well. Either way, the district court, having fair notice that Philip Morris wanted to raise both issues with us, could have performed its section 1292(b) gatekeeping function. Taking neither approach, Philip Morris instead not only jumped the fence at the district court level, but also circumvented our own screening process by waiting until after the government's opposition to raise the broader issue with the motions panel. This court should not be rewarding such tactics by exercising its discretion to hear this appeal.

I would therefore dismiss the interlocutory appeal. I reach this conclusion reluctantly because I certainly understand how hearing this interlocutory appeal could be helpful to Judge Kessler, who is presiding over a long and difficult trial. In my view, however, preserving section 1292(b)'s integrity and discouraging the kind of litigating tactics reflected in this record far outweigh the efficiency that hearing this interlocutory appeal might produce in this concededly complex case.

But the court disagrees with my position. The appeal stands before us, so in the following sections I exercise a dissenter's prerogative to address the merits. *See, e.g., Gratz v. Bollinger*, 539 U.S. 244, 291, 123 S. Ct. 2411, 156 L. Ed. 2d 257 (2003) (Souter, J., dissenting); *Arizona v. Evans*, 514 U.S. 1, 18, 115 S. Ct. 1185, 131 L. Ed. 2d 34 (1995) (Stevens, J., dissenting); *Larson v. Valente*, 456 U.S. 228, 258, 102 S. Ct. 1673, 72 L. Ed. 2d 33 (1982) (White, J., dissenting).

II.

Like my colleagues, I begin with the structure and language of RICO's remedial provisions. RICO authorizes criminal penalties and civil remedies against those engaging in patterns of racketeering behavior. 18 U.S.C. § 1963 sets out the criminal penalties: guilty persons shall "be fined under this title or imprisoned . . . or both, and shall forfeit to the United States" any illegally acquired interest. Section 1964 provides for the civil remedies. At issue in this case is subsection (a), which states:

> The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

Another subsection, § 1964(c), authorizes injured persons to sue RICO violators for treble damages and to recover attorneys' fees. Finally, Congress directed that RICO "shall be liberally construed to effectuate its remedial purposes," Pub. L. No. 91-452, § 904(a), 84 Stat. 922, 947 (1970) (codified in a note following 18 U.S.C. § 1961)—a provision that, if it "is to be applied anywhere, [should be applied] in § 1964, where RICO's

remedial purposes are most evident," *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 491 n.10, 105 S. Ct. 3275, 87 L. Ed. 2d 346 (1985).

The government argues that district courts have authority to order any remedy, including disgorgement, within their inherent equitable powers. More narrowly, the government argues that assuming the district courts may only impose equitable remedies for the purpose of keeping defendants from committing RICO violations, disgorgement—by reducing the incentives for the tobacco companies to violate RICO in the future—will accomplish that purpose in this case. These two distinct arguments present very different consequences for district courts: under the first theory, courts may order disgorgement any time they find the remedy necessary to ensure complete relief, while under the second theory courts may order disgorgement only to prevent ongoing or future violations. In this case, the district court accepted only the second argument. *See* 321 F. Supp. 2d at 74-80. The court today rejects both.

A.

In dismissing the argument that district courts may impose any equitable remedy for RICO violations, the court distinguishes—unconvincingly, in my view—the two Supreme Court cases relied on by the government, *Porter v. Warner Holding Co.*, 328 U.S. 395, 66 S. Ct. 1086, 90 L. Ed. 1332 (1946), and *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 80 S. Ct. 332, 4 L. Ed. 2d 323 (1960). I believe these two cases control this case and compel the conclusion that district courts may impose any equitable remedy for RICO violations.

In *Porter*, the Supreme Court considered whether a district court had authority to order restitution in a suit

brought by the Price Control Administrator against a landlord who had violated the Emergency Price Control Act (EPCA) by charging too much rent. The act contained no specific provision for restitution or disgorgement, but—like RICO—authorized a broad array of other remedies, both criminal and civil. On the criminal side, offenders could be fined and imprisoned. EPCA, § 205(b)-(c), 56 Stat. 23, 33 (1942). On the civil side, injured individuals could sue for treble damages plus attorneys' fees, and if they were not entitled to sue or the statutory period for their suit had passed, the Administrator could sue for the same remedy on behalf of the United States. *Id.* § 205(e), 56 Stat. at 34, *as amended by* Stabilization Extension Act of 1944, 7 § 108(b), 58 Stat. 632, 640-41. The Administrator could also sue to suspend a violator's license. *Id.* § 205(f)(2), 56 Stat. at 35.

In the section most at issue in *Porter*, the act further provided that

> [w]henever in the judgment of the Administrator any person has engaged or is about to engage in [violations of the act], he may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond.

Id. § 205(a), 56 Stat. at 33. Although this section clearly authorized injunctions aimed at future behavior, it made no express provision for restitution and did not, contrary to my colleagues' suggestion, explicitly

"grant[] general equitable jurisdiction" to the district courts, *see* majority op. at 1197. Indeed, in *Porter*, the Eighth Circuit had held that district courts were without authority to order restitution as a remedy for violations of the EPCA. *Bowles v. Warner Holding Co.*, 151 F.2d 529, 532 (8th Cir. 1945) (concluding that the district court had no authority to order restitution because "[i]t is well settled 'That where a statute creates a right and provides a special remedy, that remedy is exclusive' ") (citations omitted).

The Supreme Court reversed. Discussing "the jurisdiction of the District Court to enjoin acts and practices made illegal by the Act and to enforce compliance with the Act," 328 U.S. at 397-98, 66 S. Ct. 1086, the Court concluded—and I quote at length since the language is so critical to the disposition of this case—that

> [s]uch a jurisdiction is an equitable one. Unless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction. And since the public interest is involved in a proceeding of this nature, those equitable powers assume an even broader and more flexible character than when only a private controversy is at stake . . . . [T]he court may go beyond the matters immediately underlying its equitable jurisdiction and decide whatever other issues and give whatever other relief may be necessary under the circumstances. Only in that way can equity do complete rather than truncated justice.
>
> Moreover, the comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Un-

> less a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied.

Id. at 398, 66 S. Ct. 1086 (citations omitted). The Court concluded that because the EPCA, despite the very detailed and specific nature of the authorized remedies, did not rule out restitution by a "necessary and inescapable inference," the district court could order restitution even if not expressly authorized by the statute. *See id.* at 398-400, 66 S. Ct. 1086; *see also Mitchell*, 361 U.S. at 291, 80 S. Ct. 332 (discussing *Porter*).

Indeed, the Court further suggested that restitution could be considered an "other order" to enjoin or enforce compliance within section 205(a) in either of two ways. First, it could be "considered as an equitable adjunct to an injunction decree" since "where, as here, the equitable jurisdiction of the district court has properly been invoked for injunctive purposes, the court has the power to decide all relevant matters in dispute and to award complete relief even though the decree includes that which might be conferred by a court of law." 328 U.S. at 399, 66 S. Ct. 1086. Second, restitution could "be considered as an order appropriate and necessary to enforce compliance with the Act" since "[f]uture compliance may be more definitely assured if one is compelled to restore one's illegal gains." *Id.* at 400, 66 S. Ct. 1086. The Court then remanded for the district court to "exercise the discretion that belongs to it" and decide whether to order restitution. *Id.* at 403, 66 S. Ct. 1086.

Porter was not unanimous. "It is not excessive to say that perhaps no other legislation in our history has equaled the Price Control Acts in the wealth, detail,

precision and completeness of its jurisdictional, procedural and remedial provisions," *id.* at 404, 66 S.Ct. 1086, wrote Justice Rutledge in dissent. "The scheme of enforcement was highly integrated, with the parts precisely tooled and minutely geared." *Id.* "Congress could not have been ignorant of the remedy of restitution. It knew how to give remedies it wished to confer." *Id.* at 405, 66 S. Ct. 1086. "[E]ven courts of equity may not grant relief in disregard of the remedies specifically defined by Congress." *Id.* at 408, 66 S. Ct. 1086.

The court's opinion today sounds a lot like the *Porter* dissent. The court observes that the language of section 1964(a)—a court has "jurisdiction to prevent and restrain violations"—does not explicitly open the door to all of equity, but neither did EPCA section 205(a) (a court may issue orders "enjoining" violations or "enforcing compliance"). The court asserts that reading full equitable jurisdiction into RICO will render section 1964(a)'s language largely meaningless, but *Porter* rejected just this concern with regard to EPCA section 205(a). The court emphasizes that RICO "already provides for a comprehensive set of remedies," majority op. at 1200, but the EPCA had at least as comprehensive a remedial structure. The court further points out that should restitution be available, the government could obtain duplicative recovery (given RICO's criminal forfeiture provisions) and also escape the applicable statutes of limitations, but the *Porter* majority dismissed similar concerns, 328 U.S. at 401-02, 66 S. Ct. 1086; *see also id.* at 406-08, 66 S. Ct. 1086 (Rutledge, J., dissenting). Finally, the court attempts to distinguish *Porter* on the grounds that the EPCA had a different policy goal than RICO (preventing inflation rather than

seeking to eradicate organized crime), but this has no effect on *Porter*'s essential holding that "the court may go beyond the matters immediately underlying its equitable jurisdiction . . . and give whatever other relief may be necessary under the circumstances," *see id.* at 398, 66 S. Ct. 1086. In sum, the court offers no basis for concluding that RICO's structure and language get the statute past *Porter*'s high bar for finding by a "necessary and inescapable inference" that Congress intended to empower district courts to order only limited equitable relief.

Nor does Philip Morris point to anything in RICO's legislative history that creates such a "necessary and inescapable inference." Only one remark even gives me pause. The Senate Committee report stated, "Subsection [1964](a) contains broad remedial provisions for reform of corrupted organizations. Although certain remedies are set out, the list is not exhaustive, and the only limit on remedies is that they accomplish the aim set out of removing the corrupting influence and make due provision for the rights of innocent persons." S. Rep. No. 91-617, at 160 (1969); *accord* H. Rep. No. 91-1549, at 57 (1970). The second part of this "limit"—requiring due provision for the rights of innocent persons—poses no concern, for it describes equity rather than constricts it. *See, e.g., Holly v. Domestic & Foreign Missionary Soc'y*, 180 U.S. 284, 295, 21 S. Ct. 395, 45 L. Ed. 531 (1901) ("[A] court of equity will not transfer a loss that has already fallen upon one innocent party to another party equally innocent."). But the first part of this "limit"—that remedies should accomplish the aim of removing the corrupting influence—does more than simply restate an equitable principle. Suggesting that the remedies must remove the corrupting

influence, it allows one to infer that remedies may accomplish *only* this aim. But that inference is, to use *Porter*'s words, neither "necessary" nor "inescapable." One could also infer that remedies must accomplish this aim as a lower limit (i.e., no corrupting influence may remain), but may also accomplish other aims—just as remedies must make due provision for the rights of the innocent, but may presumably do much more. Indeed, this reading comports with how RICO's sponsor, Senator McClellan, described the bill when he introduced it: the "ability of our chancery courts to formulate a remedy to fit the wrong is one of the greatest benefits of our system of justice. This ability is not hindered by the bill." 115 Cong. Rec. 9567 (1969).

Mitchell, the second Supreme Court decision the government relies on, considered whether district courts could order restitution of wages lost from unlawful discharge in suits brought by the Secretary of Labor under section 17 of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 217 (1960). Relying on *Porter*, the Court concluded that where the statute provided that "the district courts are given jurisdiction . . . for cause shown, to restrain violations" of the act, 29 U.S.C. § 217, district courts had full equitable powers, 361 U.S. at 291-95, 80 S. Ct. 332; *see also id.* at 289, 80 S. Ct. 332. Reaffirming *Porter's* strong presumption in favor of finding equitable relief fully available, the Court stated: "When Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief in the light of statutory purposes. As this Court long ago recognized, 'there is inherent in the Courts of Equity a jurisdiction to . . . give effect to the policy of

the legislature.'" *Id.* at 291-92, 80 S. Ct. 332 (quoting *Clark v. Smith*, 38 U.S. (13 Pet.) 195, 203, 10 L. Ed. 123 (1839)) (omission in original); *see also Califano v. Yamasaki*, 442 U.S. 682, 704-06, 99 S. Ct. 2545, 61 L. Ed. 2d 176 (1979) (using the *Porter* presumption to conclude that district courts could order injunctive relief not explicitly authorized by the Social Security Act). The *Mitchell* Court thought it insignificant that because both the aggrieved employees and the Secretary could seek lost wages in actions at law under FLSA section 16, 29 U.S.C. § 216 (1960), duplicative recovery might occur. 361 U.S. at 292-93, 80 S. Ct. 332. *But see id.* at 303, 80 S. Ct. 332 (Whittaker, J., dissenting) (concluding that the statutory scheme "seems plainly to show that Congress intended by § 16(c) to allow recovery of unpaid minimum wages and overtime compensation at the instance of the Secretary only in an action at law, brought under that subsection, and triable by a jury").

Mitchell reinforces the proposition that district courts may order any equitable relief in civil RICO suits brought by the government. My colleagues suggest that in "the RICO Act, Congress provided a statute granting jurisdiction defined with the sort of limitations not present in the FLSA." Majority op. at 1199. The only jurisdictional hook in the FLSA's text, however, was its language: "the district courts are given jurisdiction . . . for cause shown, to restrain violations" of the act, 29 U.S.C. § 217. If this language opens the door to all equitable relief, then RICO's language—"[t]he district courts . . . shall have jurisdiction to prevent and restrain violations"—certainly does the same. And if the possibility of duplicative recovery did not circumscribe the district court's equitable

authority under the FLSA, then neither should that possibility under RICO do so.

Not surprisingly, in the wake of *Mitchell* and *Porter*, circuit courts including this one have read general equitable jurisdiction into a variety of statutes that fail to provide explicitly for it. In *SEC v. First City Financial Corp.*, 890 F.2d 1215 (D.C. Cir. 1989), we held that district courts may order disgorgement under the Security Exchange Act's sections 21(d) and (e), 15 U.S.C. § 78u(d)-(e) (1989), which provide that the district courts "shall have jurisdiction to issue writs of mandamus, injunctions, and orders commanding" compliance with the act and regulations made under it. *See* 890 F.2d at 1230 (relying on *Porter* and *Mitchell*). "Disgorgement, then, is available simply because the relevant provisions of the Securities Exchange Act of 1934, sections 21(d) and (e) . . . vest jurisdiction in the federal courts." *Id.; see also SEC v. Tome*, 833 F.2d 1086, 1096 (2d Cir. 1987); *SEC v. Wash. County Util. Dist.*, 676 F.2d 218, 227 (6th Cir. 1982). Other circuits have reasoned similarly in interpreting other acts. *See, e.g., FTC v. Gem Merch. Corp.*, 87 F.3d 466, 468-70 (11th Cir. 1996) (applying *Porter* in holding that courts may order restitution as a remedy for violations of the Federal Trade Commission Act); *ICC v. B & T Transp. Co.*, 613 F.2d 1182, 1183-86 (1st Cir. 1980) (applying *Porter* in holding that courts may order restitution as a remedy for violations of the Motor Carrier Act, though noting that "[i]f we were writing on a blank slate, we might agree with the district court that the language of the Motor Carrier Act cannot justify" the remedy of restitution); *CFTC v. Hunt*, 591 F.2d 1211, 1221-23 (7th Cir.1979) (applying *Porter* in holding that courts may

order disgorgement as a remedy for violations of the Commodity Exchange Act).

Instead of following *Porter* and *Mitchell*, the court relies on a later Supreme Court decision, *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 116 S. Ct. 1251, 134 L. Ed. 2d 121 (1996). In *Meghrig*, the Supreme Court considered whether private citizens could seek restitution under the Resource Conservation and Recovery Act (RCRA) for the cost of having cleaned up a prior landowner's toxic waste. The statute provided that the "district court shall have jurisdiction . . . to restrain any person who has contributed or who is contributing" to waste problems, "to order such person to take such other action as may be necessary, or both." *Id.* at 482 n.*, 116 S. Ct. 1251 (quoting 42 U.S.C. § 6972(a)). The Court held that it was "apparent from the two remedies described . . . that RCRA's citizen suit provision is not directed at providing compensation for past cleanup efforts." *Id.* at 484, 116 S. Ct. 1251. While not explicitly defining the limits of the two remedies described, the court suggested that these remedies should be equated with prohibitory and mandatory injunctions. *Id.* Moreover, relying in part on the fact that an analogous statute expressly authorized damages, the Court concluded that "neither remedy . . . contemplates the award of past cleanup costs, whether these are denominated 'damages' or 'equitable restitution.'" *Id.* at 484-85, 116 S. Ct. 1251. According to the Court, it "is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." *Id.* at 488, 116 S. Ct. 1251 (quoting *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n,*

453 U.S. 1, 14- 15, 101 S. Ct. 2615, 69 L. Ed. 2d 435 (1981)).

The *Meghrig* Court noted that in arguing that the district court had inherent authority to award equitable remedies, the plaintiffs relied on *Porter* and its progeny. *Id.* at 487, 116 S.Ct. 1251. Without expressly distinguishing those cases, the Court explained that "the limited remedies described in [RCRA], along with the stark differences between the language of that section and the cost recovery provisions [of the analogous statute], amply demonstrate that Congress did not intend for a private citizen to be able to undertake a cleanup and then proceed to recover its costs under RCRA." *Id.* Notably for our purposes, *Meghrig* did not overrule *Porter*. Indeed, even after *Meghrig*, the Supreme Court has cited *Porter* for the proposition that "we should not construe a statute to displace courts' traditional equitable authority absent . . . an 'inescapable inference' to the contrary." *Miller v. French*, 530 U.S. 327, 340, 120 S. Ct. 2246, 147 L. Ed. 2d 326 (2000); *see also United States v. Oakland Cannabis Buyers' Co-op.*, 532 U.S. 483, 496, 121 S. Ct. 1711, 149 L. Ed. 2d 722 (2001).

At one level, reconciling *Meghrig* with *Porter* and *Mitchell* is difficult. *Meghrig* suggests that "to restrain" only authorizes prohibitory injunctions. By contrast, *Mitchell* holds that this language imposes no limit on the district court's full equitable powers. *Meghrig*, relying on a version of the canon *expressio unius est exclusio alterius*, observes that courts should be "chary" in reading remedies into a statute which expressly provides for other remedies. By contrast, *Porter* indicates that in the context of equity jurisdiction, the general *expressio unius* canon gets inverted,

meaning that district courts possess all equitable powers unless the statute "inescapabl[y]" provides to the contrary. *Cf. Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1, 18-20, 94 S. Ct. 1028, 39 L. Ed. 2d 123 (1974) (discussing these competing canons).

These tensions cannot be dealt with simply by dismissing *Porter* and *Mitchell*. *Meghrig* not only left both cases intact, but also suggested that the "limited remedies" in RCRA, together with the "stark differences" between RCRA and the analogous statute, explain the different outcomes. Given this, our responsibility is to follow the Supreme Court's oft-cited instruction that "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484, 109 S. Ct. 1917, 104 L. Ed. 2d 526 (1989); *see also Agostini v. Felton*, 521 U.S. 203, 237, 117 S. Ct. 1997, 138 L. Ed. 2d 391 (1997) (reaffirming this requirement).

In my view, *Porter* and *Mitchell*, not *Meghrig*, "directly control" this case. Several reasons support this conclusion, and nothing points the other way. First, RICO's statutory scheme resembles the EPCA more than the RCRA. Both RICO and the EPCA stand alone in grappling with a broad social issue, whereas the RCRA had a closely related statute on which the Court in *Meghrig* relied heavily. Second, as in both *Porter* and *Mitchell*, the government brought the suit rather than a private party like the *Meghrig* plaintiff, and *Porter* makes clear that district courts may have "even broader and more flexible" equitable powers

where the public interest is involved, 328 U.S. at 398, 66 S. Ct. 1086. This point has particular traction if the government is the only party that may seek equitable relief under RICO. *See Religious Tech. Ctr. v. Wollersheim*, 796 F.2d 1076, 1083-89 (9th Cir. 1986) (holding that equitable relief under RICO is available only to the government). *But see Nat'l Org. for Women, Inc. v. Scheidler*, 267 F.3d 687, 695-700 (7th Cir. 2001) (holding that private plaintiffs can seek equitable relief under RICO), *rev'd on other grounds*, 537 U.S. 393, 123 S. Ct. 1057, 154 L. Ed. 2d 991 (2003). Finally, *Meghrig*'s suggestion that "restrain" in the RCRA refers only to prohibitory injunctions cannot apply to section 1964(a), since that section explicitly authorizes other remedies —e.g., divestment—to "prevent and restrain" RICO violations. For these reasons, in determining whether the phrase "prevent and restrain" limits the district court's equitable powers, I think it makes more sense to look to *Porter* and *Mitchell*, not *Meghrig*.

The court "[r]ead[s] *Porter* in light of" the statement in *Kokkonen v. Guardian Life Insurance Co.*, 511 U.S. 375, 377, 114 S. Ct. 1673, 128 L. Ed. 2d 391 (1994), that "'[f]ederal courts are courts of limited jurisdiction'" and "'possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree.'" Majority op. at 1197. But "'[j]urisdiction,' it has been observed, 'is a word of many, too many, meanings.'" *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 90, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998) (citation omitted). *Kokkonen* simply makes the unremarkable point that federal courts have subject-matter jurisdiction over cases only if the Constitution or Congress so provides, 511 U.S. at 377, 114 S. Ct. 1673, and the Supreme Court has since clarified that it is "unrea-

sonable" to apply subject-matter jurisdiction principles where a statute uses the term jurisdiction "merely [in] specifying the remedial *powers* of the court," *Steel Co.*, 523 U.S. at 90, 118 S. Ct. 1003.

Finally, while Congress modeled section 1964(a) on the antitrust laws, *see* 115 Cong. Rec. 9567 (1969) (statement of Sen. McClellan); *see also* 15 U.S.C. § 4 (the "district courts . . . are invested with jurisdiction to prevent and restrain violations"); *accord* 15 U.S.C. § 25, I disagree with Philip Morris that the Supreme Court's antitrust decisions provide useful guidance as to whether the phrase "prevent and restrain" limits the equitable remedies available to district courts. On the one hand, the Court once ignored, though did not explicitly reject, an invitation by Justice Douglas to apply *Porter* to antitrust actions. *See United States v. Nat'l Lead Co.*, 332 U.S. 319, 366-67, 67 S. Ct. 1634, 91 L.Ed. 2077 (1947) (Douglas, J., dissenting in part); *cf. United States v. Oregon State Med. Soc'y*, 343 U.S. 326, 333, 72 S. Ct. 690, 96 L. Ed. 978 (1952) (emphasizing that in antitrust actions the purpose of injunctive relief is to "forestall future violations"); *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 639-47, 101 S. Ct. 2061, 68 L. Ed. 2d 500 (1981) (declining to fashion and apply a common law right of contribution in the antitrust context). On the other hand, some antitrust cases suggest that courts may impose equitable remedies beyond those intended merely to stop future violations from occurring. *E.g., United States v. Crescent Amusement Co.*, 323 U.S. 173, 189, 65 S. Ct. 254, 89 L. Ed. 160 (1944) (although the district court ordered a remedy said to "exceed any reasonable requirement for prevention of future violations," the "Court has quite consistently recognized in this type of Sherman Act case that

the government should not be confined to an injunction against further violations. . . . Those who violate the Act may not reap the benefits of their violations"); *cf. United States v. U.S. Steel Corp.*, 251 U.S. 417, 452, 40 S. Ct. 293, 64 L. Ed. 343 (1920) (observing that the Sherman Act is "clear in its direction that the courts of the nation shall prevent and restrain [monopolies] (its language is 'to prevent and restrain violations of' the act); but the command is necessarily submissive to the conditions which may exist and the usual powers of a court of equity to adapt its remedies to those conditions"); *Schine Chain Theatres v. United States*, 334 U.S. 110, 128, 68 S. Ct. 947, 92 L. Ed. 1245 (1948) (suggesting that "[l]ike restitution," divestment "merely deprives a defendant of the gains from his wrongful conduct" and upholding it as a remedy under the Sherman Act), *overruled on other grounds by Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 763 n.8, 777, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984). As these cases illustrate, antitrust precedent offers little reason to doubt the applicability of *Porter* and *Mitchell* to the case at hand.

To sum up, *Porter* and *Mitchell* rather than *Meghrig* control this case, and no "necessary and inescapable inference" limits the district court's jurisdiction in equity. If the district court concludes that the government has shown that the tobacco companies have committed RICO violations by advertising to youth despite assertions to the contrary and by falsely disputing smoking's addictive, unhealthy effects, then it may order whatever equitable relief it deems appropriate. Of course, the court must work within the bounds of equitable doctrines, recognizing defenses like laches and unclean hands, paying due regard for the rights of

the innocent, and generally exercising its discretion. With these principles in mind, the district court can "do complete rather than truncated justice," *Porter*, 328 U.S. at 398, 66 S. Ct. 1086.

B.

In addition to rejecting the government's argument that district courts may impose any equitable remedy on RICO violators, the court rejects the government's alternative, narrower argument—that even if district courts may order only remedies that "prevent and restrain" RICO violations, disgorgement can appropriately accomplish that purpose. Because the court's analysis of this argument is as flawed as its analysis of the government's broader argument, I add this discussion of the issue. In my view, the court transforms what should be a question of fact—what remedies appropriately prevent and restrain future violations—into a question of statutory interpretation in a way that disregards section 1964(a)'s plain language and ignores Supreme Court precedent recognizing the equitable flexibility of district courts.

Under section 1964(a), district courts may issue "appropriate orders" to prevent and restrain" RICO violations. "Prevent" has many meanings. The first non-archaic one listed in *Webster's Third New International Dictionary* (1961) is "to deprive of power or hope of acting, operating, or succeeding in a purpose." "Restrain" can mean "to hold (as a person) back from some action, procedure, or course: prevent from doing something (as by physical or moral force or social pressure)" and "to limit or restrict to or in respect to a particular action or course: keep within bounds or under control." *Webster's Third New International Dictionary* (1961).

The government offers expert testimony to the effect that a disgorgement order will deter the tobacco companies from violating RICO in the future—in the dictionary's language, it will deprive them of the hope of succeeding in benefiting from future RICO violations and hold them back from committing such violations. In essence, the government claims that the tobacco companies, having engaged in a persistent pattern of deceptive representations over decades, will be less likely to continue this illegal behavior if they must surrender their past ill-gotten profits. Treating the government's expert testimony as correct, as we must at this stage of the litigation, *see Anderson*, 477 U.S. at 255, 106 S. Ct. 2505, I think it enough to forestall summary judgment in Philip Morris's favor. Indeed, the Supreme Court has accepted just this theory of deterrence, stating in *Porter* that restitution "could be considered as an order appropriate and necessary to enforce compliance with the Act" since "[f]uture compliance may be more definitely assured if one is compelled to restore one's illegal gains." 328 U.S. at 400, 66 S. Ct. 1086. If restitution helps enforce compliance, then we should have little doubt that disgorgement helps prevent and restrain violations.

This court does not conclude that disgorgement can never have a restraining effect on future conduct of the defendants—the only conclusion that could justify a holding that district courts can never order disgorgement under section 1964(a). Instead, the court offers several unpersuasive reasons for its conclusion that as a matter of statutory interpretation disgorgement is not a permissible remedy under section 1964(a).

First, the court states that disgorgement "is a quintessentially backward-looking remedy." Majority

op. at 1198. Although I agree that a court sitting in equity cannot order disgorgement that exceeds a defendant's past ill-gotten profits, *see Tull v. United States*, 481 U.S. 412, 424, 107 S. Ct. 1831, 95 L. Ed .2d 365 (1987) (observing that "[r]estitution is limited to 'restoring the status quo and ordering the return of that which rightfully belongs to the purchaser or tenant'") (quoting *Porter*, 328 U.S. at 402, 66 S.Ct. 1086), this does not mean disgorgement is always backward-looking and can never have a forward-looking effect on the defendants. The Supreme Court made this clear in *Porter*, 328 U.S. at 400, 66 S.Ct. 1086, and *Meghrig* nowhere rejects *Porter*'s conclusion that a disgorgement order can impact future conduct—indeed, there was no evidence in *Meghrig* that the defendants were likely to commit future RCRA violations, and in any event, as discussed *supra* at 1220-21, *Porter* and *Mitchell* are the cases most directly on point for our purposes.

Second, the court concludes that district courts are limited not merely by the words "prevent and restrain," but also "by those [three remedies] explicitly included in the statute" by application of the canons *noscitur a sociis* and *ejusdem generis*. *See* majority op. at 1200; *cf. United States v. Thomas*, 361 F.3d 653, 659 (D.C. Cir. 2004) (defining these canons). Even assuming we should apply these canons, however, they spell out nothing more than what everyone agrees on: that the only "appropriate" orders under this section are equitable ones. *See West v. Gibson*, 527 U.S. 212, 225-26, 119 S. Ct. 1906, 144 L. Ed. 2d 196 (1999) (Kennedy, J., dissenting) (observing that these canons "suggest the appropriate remedies authorized by [a statute using the word 'including'] are remedies of the same nature as re-

instatement, hiring, and backpay—*i.e.*, equitable remedies" and noting that "the phrase 'appropriate remedies,' furthermore, connotes the remedial discretion which is the hallmark of equity").

More important, I doubt the canons apply here at all. While the canons can prove useful where there is otherwise "no general principle in sight," *Dong v. Smithsonian Inst.*, 125 F.3d 877, 880 (D.C. Cir.1 997); *see also Wash. State Dep't of Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 384, 123 S. Ct. 1017, 154 L. Ed. 2d 972 (2003) (applying the canons in interpreting the last listed term of "execution, levy, attachment, garnishment, or other legal process"), here the statute provides the general principle of preventing and restraining violations. Indeed, the Supreme Court declined to use these canons altogether in interpreting a statute which gave the EEOC the power of enforcement "through appropriate remedies, including reinstatement or hiring of employees with or without back pay," 42 U.S.C. § 2000e-16(b). *See West*, 527 U.S. at 218, 119 S. Ct. 1906 (stating that the "word 'including' makes clear that 'appropriate remedies' are not limited to the examples that follow that word"); *cf. Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 588-89, 100 S. Ct. 1889, 64 L. Ed. 2d 525 (1980) (declining to apply *ejusdem generis* canon where Congress used "expansive language"). I see no reason why we should do otherwise here, especially since section 1964(a) uses the even more expansive language: "including, but not limited to." Finally, *noscitur a sociis* and *ejusdem generis* should not be used to limit the types of equitable relief available to district courts given Congress's instruction that RICO "shall be liberally construed to effectuate its remedial purposes," *see supra* at 1215, one of which is preventing

and restraining future violations—an aim that, far from being a "new purpose[ ] that Congress never intended," *see* majority op. at 1201 (quoting *Reves v. Ernst & Young*, 507 U.S. 170, 183, 113 S. Ct. 1163, 122 L. Ed. 2d 525 (1993)), expressly appears in the statute's text. If an equitable remedy achieves this goal, then the statute authorizes it.

Third, the court suggests that disgorgement should be unavailable because it allows the government to achieve relief "similar in effect" to criminal forfeiture, raising concerns that the government can achieve duplicative recovery and evade the procedural safeguards girding the forfeiture provision. *See* majority op. at 1200-01. To be sure, such concerns are relevant in considering whether to infer additional causes of action. As discussed earlier, *supra* at 1217, however, given the Supreme Court's explicit rejection of similar concerns in *Porter* and *Mitchell*, they cannot carry the day. Nor should such concerns stop a court from issuing equitable orders that accomplish the express statutory purpose of preventing and restraining RICO violations, whether the remedies are specifically listed in section 1964(a), e.g., divestment, or available as other "appropriate orders." Discussing RICO, the Supreme Court has observed that "Congress has provided civil remedies for use when the circumstances so warrant. It is untenable to argue that their existence limits the scope of the criminal provisions." *United States v. Turkette*, 452 U.S. 576, 585, 101 S. Ct. 2524, 69 L. Ed. 2d 246 (1981). The converse should hold as well. If an equitable remedy prevents and restrains RICO violations —one of the remedial purposes which we should liberally construe the statute to effectuate—it is untenable to claim that the existence of criminal provisions

renders this remedy nonetheless beyond the scope of district court authority.

Of course, that disgorgement may sometimes serve to prevent and restrain defendants from committing RICO violations does not mean that it will always accomplish that purpose. As the district court here recognized, a court must first find that the defendants are likely to commit future RICO violations. 321 F. Supp. 2d at 75-76. This is not a foregone conclusion. In *Carson*, for example, while the Second Circuit recognized that disgorgement can sometimes serve to prevent and restrain RICO violations, it was rightly skeptical that disgorgement of the "gains ill-gotten long ago by a retiree" who had long since left the union position that he had abused in accepting kickbacks would accomplish this purpose. 52 F.3d at 1182. Assuming district courts are limited to remedies that prevent and restrain, *but see supra* Part II.A, I also share the Second Circuit's apparent conclusion that disgorgement may be ordered only to prevent and restrain *a defendant* from future RICO violations, *see* 52 F.3d at 1182. *But see Richard v. Hoechst Celanese Chem. Group*, 355 F.3d 345, 355 (5th Cir. 2003) (leaving open the possibility that disgorgement might be ordered solely to deter other possible offenders). Because any remedy imposed for a solely exemplary purpose (i.e., to dissuade others from committing RICO violations) would amount to punishment, it goes beyond what Congress intended, *see* S. Rep. No. 91-617, at 81, as well as pushes the boundaries of what equity permits, *cf. Tull*, 481 U.S. at 422, 107 S. Ct. 1831. In this case, however, the government offers evidence that the defendant companies themselves are likely to commit future RICO violations by misleading the public about the health consequences

of smoking and the addictive effects of nicotine, as well as by persisting in marketing to young people.

According to Philip Morris, only injunctions are "appropriate orders" under section 1964(a) because, in its view, they will always adequately prevent past lawbreakers from committing future violations, particularly given the threat of heavy contempt penalties. Refining this point, the concurrence finds it "almost inconceivable" that disgorgement can change the incentives governing a defendant's future behavior given RICO's other provisions. *See* sep. op. at 1204 (Williams, J., concurring). The concurrence thus concludes that as a matter of law, Congress intended to exclude disgorgement from those remedies appropriate to prevent and restrain RICO violations. *See id.* at 1204-05. I think this approach is flawed in several respects.

To begin with, as noted above, *Porter* indicated that disgorgement may encourage guilty defendants to obey the law in the future. Interpreting a statute replete (like RICO) with other remedies, the Court concluded that "[f]uture compliance may be more definitely assured if one is compelled to restore one's illegal gains." 328 U.S. at 400, 66 S. Ct. 1086. We are without license to ignore the Supreme Court's views on this point.

Moreover, Philip Morris's suggestion that only injunctions provide "appropriate" relief under section 1964(a) not only cuts against the statute's plain language—Congress would hardly have included divestment in its list of sample remedies if it thought injunctions alone would be adequate—but also ignores the equitable flexibility the statute was designed to preserve, *see, e.g.*, 115 Cong. Rec. 9567 (1969) (statement of Sen. McClellan). Indeed, nothing in the statute requires courts to prefer contempt penalties (not explic-

itly named in section 1964(a)) to disgorgement (also not explicitly named). Rather, no single remedy is always appropriate. "The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mold each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it." *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15, 91 S. Ct. 1267, 28 L. Ed. 2d 554 (1971) (quoting *Hecht Co. v. Bowles*, 321 U.S. 321, 329-30, 64 S. Ct. 587, 88 L. Ed. 754 (1944)). Sometimes injunctive relief alone will make the most sense; other times, different equitable remedies or combinations of equitable remedies, perhaps including disgorgement, might prove as or more effective.

To be sure, given RICO's comprehensive remedial scheme, disgorgement orders may prove appropriate in preventing and restraining future violations only in rare circumstances. But "[i]n equity, as nowhere else, courts [should] eschew rigid absolutes," *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 777 n.39, 96 S. Ct. 1251, 47 L. Ed. 2d 444 (1976) (internal quotation marks and citation omitted), and precisely what remedy or combination of remedies, within the bounds of the equitable doctrines discussed earlier, will serve to prevent and restrain defendants from committing RICO violations is an issue of fact, not statutory interpretation. For these determinations, we must rely in the first instance not on what we appellate judges can or cannot imagine will "prevent or restrain," but on tried and true methods of fact-finding before district courts—including cross-examination and presentation of contrary evidence. *Cf. id.* at 780, 96 S. Ct. 1251 (noting district courts' " 'keener appreciation' of peculiar facts and circumstances") (citation omitted).

Finally, and again as noted earlier, record evidence in this case suggests that disgorgement will in fact "prevent and restrain" defendants from committing future RICO violations. As one of the government's experts stated, "[R]equiring defendants to pay proceeds will affect their expectations . . . about the returns from future misconduct." Appellee's App. at 813. The expert added that, even if coupled with an injunction laden with contempt penalties, disgorgement will "provide additional economic incentives to deter future misconduct" by "strengthen[ing] the credibility of existing laws" which the defendants have allegedly violated in the past. *Id.* at 814. Disagreeing, the concurrence offers its own "expert opinion" of the incentives driving the behavior of past RICO violators. *See* sep. op. at 1203-05, 1205-06. According to the concurrence, the most appropriate deterrence will stem from the "spotlight of the lawsuit," if properly "amplif[ied]" by "transparency-enhancing and prior-approval measures." *Id.* at 1205. Perhaps so, but "on summary judgment, the evidence should be viewed in favor of the nonmoving party, not," as the concurrence would have it, "the other way around." *Langon v. Dep't Health & Human Servs.*, 959 F.2d 1053, 1059 (D.C. Cir. 1992) (reversing district court grant of summary judgment where that court disregarded admissible expert testimony); *see also Sears, Roebuck & Co. v. Gen. Servs. Admin.*, 553 F.2d 1378, 1381-83 (D.C. Cir. 1977) (holding that district court inappropriately granted summary judgment where experts disagreed about whether certain data constituted a "trade secret" from which an intelligent competitor could gain information). At this stage of the litigation, then, we must assume that the government expert is correct and that disgorgement will "prevent and restrain" future RICO violations. Should Philip

Morris offer expert testimony along the lines suggested by the concurrence, then it will be up to the district court to evaluate the competing evidence and make appropriate findings of fact. Should either party appeal, this court, unrestrained by the inferences required at summary judgment, would then review that factual determination pursuant to Rule 52's clear error standard. *See* Fed. R. Civ. P. 52 advisory committee's note (observing that judgment under this standard "differs from a summary judgment under Rule 56 in the nature of the evaluation made by the court"); *see also* 9A Wright & Miller, *Federal Practice and Procedure* § 2585 (2d. ed. 1994) (noting that under Rule 52 a reviewing court need not view the evidence in the light most favorable to the appellee).

C.

In sum, were this case properly before us, I would hold, in accordance with *Porter* and *Mitchell*, that district courts have authority to order any remedy, including disgorgement, necessary to ensure complete relief. As the concurrence points out, sep. op. at 1206 (Williams, J., concurring), my approach would create a circuit split, since *Carson* did not apply *Porter* and *Mitchell* to RICO (and, indeed, the parties do not appear to have brought these cases to the Second Circuit's attention). Even if, as *Carson* holds, district courts may only impose equitable remedies for the purpose of keeping defendants from committing RICO violations, I would still affirm the denial of summary judgment, leaving it to the district court to determine, on the basis of a fully developed record, whether disgorgement will help accomplish this purpose. I disagree with my colleagues' conclusions not because they have created a circuit split of their own by

rejecting *Carson*'s holding that disgorgement may prevent and restrain RICO violations, but because they have done so by accepting an interlocutory appeal that we should not hear and by disregarding both Supreme Court precedent and section 1964(a)'s plain language.

III.

This leaves one final, distinct issue. Philip Morris claims that the government's disgorgement model fails as a matter of law to measure the tobacco companies' ill-gotten profits. Because the district court decided this issue in the certified order, it is—unlike the issue the court does resolve—properly before us. *See Yamaha*, 516 U.S. at 205, 116 S. Ct. 619.

In calculating disgorgement, the government first identifies what it calls the "Youth Addicted Population" (YAP), namely, all people who were smoking an average of at least 5 cigarettes a day at the time they turned 21. The government next calculates that from RICO's effective date in 1970 to 2001, the tobacco companies earned profits of $280 billion through sales to these people. The government arrives at this calculation by (1) determining the gross revenue from these total sales minus the direct costs (excluding overhead and taxes) and (2) adjusting for the time value of money. Philip Morris asserts that the government has failed to show that these profits are attributable to the companies' alleged RICO violations, relying on admissions by government experts that it would be "highly unlikely" to say that "nobody under the age of 21 would have ever smoked regularly . . . but for the defendants' alleged RICO violations."

Philip Morris cannot prevail on this issue at summary judgment because the government need not show that

nobody under 21 would have smoked but for the RICO violations. As we held in *First City Financial*, 890 F.2d at 1229, "disgorgement need only be a reasonable approximation of profits causally connected to the violation." In *First City Financial*, we found that the district court appropriately ordered disgorgement of *all* profits on a stock sale where the defendants failed to make a material disclosure, purchased stock whose value would likely have already risen had the disclosure been made, and then sold the stock for a killing after the undisclosed news broke. *See id.* at 1229-32. Although the government never proved that all increases in the stock's value stemmed from the violation, we rejected the defendants' argument that because the increase in price may have depended on other factors, disgorgement of all profits was "simplistic, quite unrealistic, and so *de facto* punitive." *See id.* at 1231. Noting that "[r]ules for calculating disgorgement must recognize that separating legal from illegal profits exactly may at times be a near-impossible task," we held that "the government's showing of appellants' actual profits on the tainted transactions at least presumptively satisfied" its "burden of persuasion that its disgorgement figure reasonably approximates the amount of unjust enrichment." *Id.* at 1231-32. Although recognizing that this might result in "actual profits becoming the typical disgorgement measure," we observed that "the risk of uncertainty should fall on the wrongdoer whose illegal conduct created that uncertainty." *Id.* at 1232; *see also SEC v. Banner Fund Int'l*, 211 F.3d 602, 617 (D.C. Cir. 2000).

Disentangling the tobacco companies' legal and illegal profits might also be a "near-impossible task." The government offers evidence that the tobacco companies

not only fraudulently suggested that smoking was harmless and nonaddictive, but did so through a comprehensive, decades-long pattern of deliberate behavior. The government further offers evidence that advertising is a "very substantial influence on young people starting to smoke," *see* Appellee's App. at 783, and that the tobacco companies committed RICO violations in advertising to young people while publicly denying that they were doing so. Under *First City Financial*, then, the government's calculations serve as a reasonable approximation: just as we permit actual profits in insider trading cases to serve as a proxy for ill-gotten gains, so too can actual profits from sales to the YAP meet the government's initial burden of reasonably approximating the tobacco companies' unlawful gains. The burden would thus shift to Philip Morris to "demonstrate that the disgorgement figure was not a reasonable approximation," 890 F.2d at 1232, and the district court would have to sort out who is right.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No. CIV.A.99-2496 GK

UNITED STATES OF AMERICA, PLAINTIFF

v.

PHILIP MORRIS USA, INC. F/K/A
PHILIP MORRIS, INC. ET AL., DEFENDANTS

May 21, 2004

MEMORANDUM OPINION

KESSLER, District Judge.

This matter is now before the Court on Defendants' Motion for Partial Summary Judgment Dismissing the Government's Disgorgement Claim ("Motion"). Upon consideration of the Motion, the Government's Opposition, the Reply, the Surreply[1] and the entire record herein, and for the reasons stated below, the Motion is **denied**.

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[1] On December 1, 2003, the Court entered ORDER # 445, granting the United States' Unopposed Motion for Leave to File a Surreply to Defendant's Reply Brief in Further Support of Their Motion for Partial Summary Judgment Dismissing the Government's Disgorgement Claim.

I. BACKGROUND

Plaintiff, the United States of America (the "Government") has brought this suit against the Defendants[2] pursuant to Sections 1962(c) and (d) of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961, *et seq.*[3] Defendants are manufacturers of cigarettes and other tobacco-related entities. The Government seeks injunctive relief and disgorgement of $280 billion dollars[4] of ill-gotten gains for what it alleges to be Defendants' unlawful conspiracy to deceive the American public. The Government's Amended Complaint describes a four-decade long conspiracy, dating from at least 1953, to intentionally and willfully deceive and mislead the American public about, among other things, the harmful nature of tobacco products, the addictive nature of nicotine, and the possibility of

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[2] Defendants are Philip Morris USA Inc. (f/k/a Philip Morris Incorporated), R.J. Reynolds Tobacco Company, Brown & Williamson Tobacco Corporation (individually and as successor by merger to the American Tobacco Company), Lorillard Tobacco Company, Altria Group Inc. (f/k/a Philip Morris Companies, Inc.), British American Tobacco (Investments), Ltd., The Council for Tobacco Research-U.S.A., Inc., the Tobacco Institute, Inc., and The Liggett Group, Inc.

[3] The Complaint originally contained four claims under three statutes. On September 28, 2000, the Court dismissed Count One (pursuant to the Medical Care Recovery Act, 42 U.S.C. § 2651, *et seq.*) and Count Two (pursuant to the Medicare Secondary Payer provisions of the Social Security Act, 42 U.S.C. §§ 1395y(b)(2)(B)(ii) & (iii)). *See United States v. Philip Morris*, 116 F. Supp. 2d 131 (D.D.C. 2000).

[4] As a result of corrections made to the Youth Addicted Population and the resulting proceeds' calculation, the amount of disgorgement sought by the Government is $280 billion, rather than $289 billion initially identified in the United States' Preliminary Proposed Conclusions of Law. *See* Govt's Opp'n., at 1.

manufacturing safer and less addictive tobacco products. Amended Complaint ("Am. Compl.") at ¶ 3.

II. ANALYSIS

Defendants seek partial summary judgment dismissing the Government's disgorgement claim on the ground that it fails to meet the standard set forth in 18 U.S.C. § 1964(a), the provision which provides statutory remedies for RICO violations. Defendants argue that any disgorgement which might be ordered upon a finding of liability must be limited by both the text of Section 1964(a) itself and the holding in *United States v. Carson*, 52 F.3d 1173 (2d Cir. 1995), interpreting that section.

To justify the $280 billion disgorgement award it seeks, the Government has developed an economic model approximating the ill-gotten gains of Defendants. *See* United States' Proposed Concl. Law, § IV.A.3. The model purports to calculate all of Defendants' proceeds from cigarettes smoked between 1971 and 2000 by persons who have been included within the Government-defined "youth addicted population." See Motion, at 3 (terms in quotes are defined within the Government's economic model). Defendants claim that the Government's economic model fails to distinguish between ill-gotten gains, which can be disgorged under Section 1964(a), and legally-gotten gains, which cannot. In addition, Defendants argue that the Government's economic model must be rejected because it does not limit disgorgement to those ill-gotten gains that "are being used to fund or promote the illegal conduct, or constitute capital available for that purpose," a standard that Defendants argue is required by Section 1964(a). Motion, at 21-22 (citing *Carson*, 52 F.3d at 1182). The Government responds that its economic

model need only reasonably approximate the ill-gotten gains of Defendants. Finally, the Government argues that the *Carson* limitation on disgorgement on which Defendants rely should be rejected because it is overly-restrictive and contrary to the text and purposes of RICO.

A. Summary Judgment Standard

Under Rule 56 of the Federal Rules of Civil Procedure, summary judgment is appropriate if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c). Material facts are those that "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). In considering a summary judgment motion, "the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Id.* at 255, 106 S. Ct. 2505. *See Washington Post Co. v. United States Dep't of Health and Human Servs.*, 865 F.2d 320, 325 (D.C. Cir. 1989).

Additionally, "if the evidence presented on a dispositive issue is subject to conflicting interpretations, or reasonable persons might differ as to its significance, summary judgment is improper." *Greenberg v. FDA*, 803 F.2d 1213, 1216 (D.C. Cir. 1986). At the summary judgment stage, "the court is not to make credibility determinations or weigh the evidence." *Dunaway v. Int'l Bhd. of Teamsters*, 310 F.3d 758, 761 (D.C. Cir. 2002).

B. Any Order of Disgorgement Must Rest upon a Showing of a Reasonable Likelihood of Future RICO Violations

Both the plain language of Section 1964(a) as well as the very nature of equitable remedies permitted under it require a showing of a reasonable likelihood of future RICO violations before a court may order any equitable remedy, including disgorgement.[5]

The text of Section 1964(a) explicitly limits the Court's jurisdiction to remedies that "prevent and restrain" future RICO violations.[6] Moreover, the three examples of permissible remedies set forth in Section

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[5] Moreover, it is well-established that the nature, seriousness, and extent of past violations may well lead to an inference of reasonable likelihood of future violations. "The likelihood of future wrongful acts is frequently established by inferences drawn from past conduct." *United States v. Local 30, United Slate, Tile and Composition Roofers, Damp and Waterproof Workers Ass'n*, 871 F.2d 401, 409 (3d Cir. 1989). *See also SEC v. Bilzerian*, 29 F.3d 689, 695 (D.C. Cir. 1994); *SEC v. Gruenberg*, 989 F.2d 977, 978 (8th Cir. 1993); *SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1228-29 (D.C. Cir. 1989).

[6] Section 1964(a) states in full:

> The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

18 U.S.C. § 1964(a).

1964(a)—divestiture, restrictions on future activities, and dissolution/reorganization—are all forward looking and focus on the goal of preventing future RICO violations. *See Richard v. Hoechst Celanese Chem. Group, Inc.*, 355 F.3d 345, 354 (5th Cir. 2003). Accordingly, the plain language of Section 1964(a) requires a showing of a reasonable likelihood of future RICO violations before a court may order disgorgement. *See Carson*, 52 F.3d at 1182. ("the jurisdictional powers of 1964(a) serve the goal of foreclosing future violations and do not afford broader redress"); *United States v. Sasso*, 215 F.3d 283, 290-91 (2d Cir. 2000) (awarding relief pursuant to Section 1964(a) turns on "whether the disgorgements [sic] ordered here are designed to prevent and restrain *future* conduct rather than to punish *past* conduct") (emphasis in original); *Richard*, 355 F.3d at 354 (equitable remedies under Section 1964(a) "are available only to prevent ongoing and future conduct").

In addition, the very nature of the equitable remedies permitted under Section 1964(a) requires a showing of reasonable likelihood of future RICO violations. *See Carson*, 52 F.3d at 1181-82; *United States v. Cappetto*, 502 F.2d 1351, 1358 (7th Cir. 1974) ("Pursuant to Section 1964 . . . whether equitable relief is appropriate depends, as it does in other cases in equity, on whether a preponderance of the evidence shows a likelihood that the defendants will commit wrongful acts in the future.") (interpreting equitable remedies under the provision which would later become Section 1964(a)); *Local 30*, 871 F.2d at 408 (same).

Accordingly, the Court concludes that the plain language of Section 1964(a), particularly the "prevent and restrain" provision, and the very nature of those equitable remedies permitted under it, require a

showing of a reasonable likelihood of future RICO violations prior to entering any order of injunctive relief or disgorgement in this action.

C. The Extremely Restrictive Limitation *Carson* Has Engrafted onto Section 1964(a) Must Be Rejected

The scope of disgorgement permitted under Section 1964(a) is a matter of first impression in this Circuit. The only other circuits to have considered this question are the Second and the Fifth. *See generally, Carson*, 52 F.3d 1173 and *Richard*, 355 F.3d 345. Defendants argue that the Court should follow the *Carson* standard requiring that disgorgement under Section 1964(a) be limited to those ill-gotten gains "being used to fund or promote the illegal conduct, or constitute capital available for that purpose." Motion, at 20-21. The Government argues that *Carson's* limitation on the scope of disgorgement is overly-restrictive and contrary to the text of RICO and the purposes of RICO disgorgement.[7]

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[7] In *Philip Morris*, 116 F. Supp. 2d 131, the Court denied in part and granted in part Defendants' motion to dismiss. It also adopted *Carson's* holding that disgorgement is a permissible remedy under Section 1964(a). It did not, however, as Defendants' claim, adopt the *Carson* legal standard relating to the scope of disgorgement.

The Court's reference to the *Carson* standard was made in response to Defendants' argument in their motion to dismiss that disgorgement is *never* available in civil RICO cases. The Court noted that it was premature to speculate as to whether disgorgement would eventually be appropriate (as opposed to available) in this case. Any apparent endorsement of *Carson* as to the specific standard for the *scope* of disgorgement would have been premature as this issue had not yet been addressed by the parties or the Court.

For the reasons set forth below, the Court declines to adopt *Carson's* limits on the scope of disgorgement.

1. The *Carson* holding

Carson involved a civil RICO action against a former union officer who had previously been convicted of embezzling union funds and taking illegal kickbacks from employers who wanted a guarantee of labor peace. The district court ordered Carson to disgorge the $16,200 in kickbacks he had received thirteen years earlier. On appeal, Carson argued, *inter alia*, that the district court had exceeded its jurisdiction when it ordered him to disgorge all his ill-gotten gains. *Carson*, 52 F.3d at 1176. The Second Circuit held, as a threshold matter, that such disgorgement is an available remedy under Section 1964(a), a holding previously endorsed by this Court as "well reasoned and persuasive." *Philip Morris*, 116 F. Supp. 2d at 151.

The Second Circuit also held that disgorgement of gains which were ill-gotten long in the past would not ordinarily "prevent and restrain" future RICO violations under Section 1964(a) unless such gains "are being used to fund or promote the illegal conduct, or constitute capital available for that purpose." *Id.* at 1182. This standard rests on the Second Circuit's interpretation of the phrase "prevent and restrain." Emphasizing that the examples of available remedies listed in the statute are "forward looking," *see* discussion *infra*, § II B, *Carson* treats the issue presented as "whether the disgorgements [sic] ordered here are designed to 'prevent and restrain' *future* conduct rather than to punish *past* conduct." *Carson*, 52 F.3d at 1182 (emphasis in original). Noting that the funds ordered disgorged had been acquired thirteen years earlier, the Second Circuit concluded that

> [c]ategorical disgorgement of all ill-gotten gains may not be justified simply on the ground that whatever hurts a civil RICO violator necessarily serves to "prevent and restrain" future RICO violations. If this were adequate justification, the phrase "prevent and restrain" would read "prevent, restrain and discourage," and would allow any remedy that inflicts pain.

Id.

2. *Carson's* limitation on the scope of disgorgement is inconsistent with the text of Section 1964(a)

The text of Section 1964(a) confers on the district court jurisdiction to "prevent and restrain" RICO violations. In *Carson*, the Second Circuit concluded that disgorgement of ill-gotten gains in Section 1964(a) RICO actions is proper only when such gains "are being used to fund or promote the illegal conduct, or constitute capital available for that purpose." *Carson*, 52 F.3d at 1182. The Second Circuit offered virtually no support for its rewriting of Section 1964(a), a rewriting which cannot be reconciled with the text of the provision for the following three reasons.

First, the plain text of Section 1964(a) does not support *Carson's* limitation on disgorgement. In order to overcome this obstacle, *Carson* interpreted the "prevent and restrain" language to preclude disgorgement unless there is a finding that "the [ill-gotten] gains are being used to fund or promote the illegal conduct or constitute capital available for that purpose," reasoning that "to prevent and restrain" does not include "to deter" or "to discourage." *Id.* However, *Carson's* narrow interpretation of Section 1964(a) cannot be squared

with Congress' intention that this provision be read broadly. *See* S. Rep. No. 91-617, at 160 (1969) (stating that RICO provides the courts with the authority to "craft equitable relief broad enough to do all that is necessary").

Moreover, the Second Circuit never explained why jurisdiction to "prevent and restrain" RICO violations fails to authorize equitable relief designed to deter defendants from committing unlawful acts in the future. Indeed, the meaning of deterrence clearly encompasses the concept of both "prevent" and "restrain." *See* BLACK'S LAW DICTIONARY (6th ed. 1991) (defining "deter" as "[t]o discourage or stop by fear; to stop or *prevent* from acting. . . .") (emphasis added); OXFORD ENGLISH DICTIONARY (2d ed. 1989), at *http://dictionary.oed.com* (defining "deter" as "1. [t]o *discourage* and turn aside or *restrain* by fear; to frighten from anything; to *restrain* or keep back from acting or proceeding by any consideration of danger or trouble") (emphasis added); MERRIAM WEBSTER'S COLLEGIATE DICTIONARY (10th ed. 1997) (defining "deter" as "to turn aside, *discourage* or *prevent* from acting") (emphasis added). Although there are minor differences of nuance amongst the words "deter," "discourage," "prevent," and "restrain," it is clear that those differences are slight, and surely not sufficient to justify the differing treatment accorded them by the Second Circuit.

Second, the Supreme Court concluded more than a half century ago that the full scope of a court's equitable jurisdiction must be recognized and applied except where "a statute in so many words, *or by a necessary and inescapable inference*, restricts the court's jurisdiction" or where there is a "clear and valid legislative command" limiting jurisdiction. *Porter v.*

Warner Holding Co., 328 U.S. 395, 398, 66 S. Ct. 1086, 90 L. Ed. 1332 (1946) (emphasis added). *Carson's* restriction on the scope of disgorgement under Section 1964(a) cannot be reconciled with this holding. The *Carson* court refused to recognize the full scope of equitable jurisdiction under Section 1964(a) even though the statutory phrase "prevent and restrain" encompasses no "clear legislative command" to limit the scope of disgorgement to exclude deterrence. Morever, as there is no language in the statute specifically limiting disgorgement to funds that are being used or remain available to fund future RICO violations, any inference of such a limitation is not "necessary and inescapable."

Given the remedial purpose of RICO, the limitation *Carson* imposes on the Court's equitable jurisdiction is particularly inappropriate in the case of Section 1964. *See Sedima, SPRL v. Imrex Co. Inc.*, 473 U.S. 479, 492 n.10, 105 S. Ct. 3275, 87 L. Ed. 2d 346 (1985) ("if Congress' liberal-construction mandate is to be applied anywhere, it is in Section 1964, where RICO's remedial purposes are most evident") (private civil RICO case).

Third, *Carson's* interpretation of RICO's "prevent and restrain" language is inconsistent with the interpretations of numerous federal courts of similarly worded equitable relief provisions in other regulatory statutes. For example, the Securities and Exchange Act of 1934 provides, in relevant part, that whenever "any person is engaged or is about to engage in acts or practices constituting a violation [of the Securities Act]," courts have jurisdiction "to enjoin such acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be

granted. . . ." *See* 15 U.S.C. § 78u(d).[8] Although this provision, like RICO's Section 1964(a), seeks to "restrain" future violations and does not explicitly provide for disgorgement, this Circuit as well as others have held that there is jurisdiction under the Securities Act to order disgorgement of proceeds obtained from a wrongdoer's past unlawful acts. *See First City Fin. Corp.*, 890 F.2d at 1229-1231; *SEC v. Materia*, 745 F.2d 197, 200 (2d Cir. 1984); *SEC v. Manor Nursing Ctrs., Inc.*, 458 F.2d 1082, 1103-05 (2d Cir. 1972).

Moreover, in interpreting the scope of the Securities Act's relief provision, no court has ruled that such disgorgement must be limited to proceeds that "are being used to fund or promote the illegal conduct, or constitute capital available for that purpose." Rather, courts have recognized that disgorgement of ill-gotten gains is essential in order to achieve the remedial purposes of the Securities Act: "to deprive a wrongdoer of his unjust enrichment and to deter others from violating the securities laws." *First City Fin. Corp.*, 890 F.2d at 1230.

Similarly, the Commodity Exchange Act authorizes courts "to enjoin" and issue a "restraining order" when a "person has engaged, is engaging, or is about to

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[8] The Securities Act states in relevant part:

> Whenever it shall appear to the Commission that any person is engaged or is about to engage in acts or practices constituting a violation of any provision of this chapter, the rules or regulations thereunder, . . . it may in its discretion bring an action in the proper district court of the United States . . . to enjoin such acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond.

15 U.S.C. § 78u(d).

engage in any act or practice constituting a violation of [the Act]." *See* 7 U.S.C. § 13a-1. Courts have held that this forward looking provision, which also does not explicitly provide for disgorgement, authorizes disgorgement of ill-gotten gains from past violations because it "may serve to deter future violations" since "[f]uture compliance may be more definitely assured if one is compelled to restore one's illegal gains." *Commodity Fut. Trad. Comm'n v. Co Petro Marketing Group, Inc.*, 680 F.2d 573, 583-84 (9th Cir. 1982). Moreover, it "would frustrate the regulatory purposes of the Act to allow a violator to retain his ill-gotten gains." *Id.* *See Commodity Futures Trad. Comm'n v. British Amer. Commod. Opt. Corp.*, 788 F.2d 92, 94 (2d Cir. 1986).

In addition, courts have consistently concluded that other forward looking remedial statutes permit broad disgorgement. *See generally, Porter*, 328 U.S. at 398, 66 S. Ct. 1086 (permitting disgorgement of profits acquired in violation of Emergency Price Control Act of 1942, *see* 50 U.S.C. § 901, although the Act does not specifically provide such a remedy); *FTC v. Gem Merchandising Corp.*, 87 F.3d 466, 468-70 (11th Cir. 1996) (allowing broad disgorgement under the Federal Trade Commission Act, *see* 15 U.S.C. § 53(b), in order to effectuate the Act's deterrent purpose even though the statute does not specifically authorize disgorgement).

Accordingly, *Carson's* limitation on the scope of disgorgement allowed under Section 1964(a) finds no support in the plain language of the statute or in the interpretations by other federal courts of similar statutory language.

3. *Carson's* limitation on the scope of disgorgement is inconsistent with the purposes of RICO

The Supreme Court has recognized that one of the purposes of civil remedies under Section 1964(a) is "to divest the association of the fruits of its ill-gotten gains." *United States v. Turkette*, 452 U.S. 576, 585, 101 S. Ct. 2524, 69 L. Ed. 2d 246 (1981) (addressing the availability of broad civil remedies under Sections 1964(a) and (c)). In reaching this conclusion, the Court did not restrict divestiture to ill-gotten gains that remain available for distribution. Moreover, our Circuit has concluded that "[d]isgorgement is . . . designed to deprive a wrongdoer of his unjust enrichment and to deter others from violating" the law. *First City Fin. Corp.*, 890 F.2d at 1230. This is true whether or not those funds are presently being used for illegal purposes or can serve as capital to promote future illegal conduct.

In addition, in the Senate Report accompanying the RICO legislation, Congress emphasized that RICO provided the courts with authority to craft "equitable relief broad enough to do all that is necessary to free the channels of commerce from all illicit activity" and to "prohibit[ ]" persons who committed a pattern of racketeering activity "from continuing to engage in this type of activity in any capacity." *See* S. Rep. No. 91-617 at 79, 82 (1969).

Defendants argue that the purposes for disgorgement upon which the Government relies "are not derived from RICO cases but from cases decided under the *securities* laws." Defs.' Mem. in Opp'n., at 11 (emphasis in original). However, neither the Second Circuit nor Defendants offer any reason to conclude that disgorgement in RICO cases does not serve the very

same purposes (deterrence and deprivation of unjust enrichment) as it does in securities cases. This Court already has recognized that "the purpose of disgorgement is to deprive the wrongdoer of his ill-gotten gains." *United States v. Philip Morris*, 273 F. Supp. 2d 3, 10 (D.D.C. 2002). As explained above, because disgorgement deters violations of the law through depriving violators of ill-gotten gains, it is forward looking and serves to "prevent and restrain" future RICO violations consistent with the jurisdiction granted in Section 1964(a).

Indeed, under the *Carson* standard, even if the Court finds a reasonable likelihood of future RICO violations, it could not order the disgorgement of illegally-acquired funds if those funds have already been spent and are therefore unavailable "to fund or promote the illegal conduct." However, our Court of Appeals has held that a rule that would limit disgorgement to only those "actual assets unjustly received," as *Carson* would require, "would lead to absurd results." *SEC v. Banner Fund Int'l*, 211 F.3d 602, 617 (D.C. Cir. 2000). In *Banner Fund Int'l*, the defendant argued that he could not comply with the disgorgement order because he did not have access to the assets that were at issue. The Court of Appeals upheld the disgorgement order, noting that district courts are not limited to "the actual property obtained by means of [the] wrongful act" because what mattered was the "amount by which the defendant was unjustly enriched." *Id.* at 617. Our Court of Appeals reasoned that under the defendant's approach

> a defendant who was careful to spend all the proceeds of his fraudulent scheme, while husbanding his other assets, would be immune from an order of

> disgorgement. [That] would be a monstrous doctrine for it would perpetuate rather than correct an inequity.

Id.

The Circuit's strong language is directly applicable to the issue presently before this Court. Here, under the reasoning in *Carson*, so long as a defendant had disposed of all illegally-acquired gains (whether through payment of dividends or capital distributions to shareholders or investment in new manufacturing facilities), such gains would be unavailable to fund present or future illegal conduct and therefore could escape disgorgement. Neither *Carson*, nor the Defendants, explain why this result is not just as "absurd" in a civil RICO case as our Circuit found it to be in a securities case or why it would not "perpetuate rather than correct an inequity."

Carson seems to assume that disgorgement which is not limited to gains which "are being used to fund or promote the illegal conduct, or constitute capital available for that purpose" would be inherently punitive, in violation of Section 1964(a). However, because disgorgement of ill-gotten gains serves a deterrent purpose, it can "prevent and restrain" future RICO violations without being designed to punish. In fact, by limiting the district court's ability to deter violations through disgorgement, *Carson's* restriction would weaken the court's ability to "prevent and restrain" future violations as provided in Section 1964(a). *See Richard*, 355 F.3d at 356 (Wiener, J, dissenting) ("It has to be self-evident to courts and litigants alike that a prayer for disgorgement of profits . . . is intended to prevent and restrain similar future conduct. . . . By its very nature, disgorgement is designed to prevent

manufacturers of similar products from engaging in such conduct in the future.") (internal citation omitted).[9]

In short, the Court does not find persuasive *Carson's* rationale for limiting disgorgement under Section 1964(a) to funds that "are being used to fund or promote the illegal conduct, or constitute capital available for that purpose," *Carson*, 52 F.3d at 1182, and will not engraft onto a broad remedial statute such as RICO that narrow limitation.

D. Whether the Government's Economic Model Is Accurate, Adequate, or Appropriate Is a Fact-Intensive Inquiry to Be Decided at Trial

Defendants seek partial summary judgment dismissing the Government's disgorgement claim on the ground that its economic model fails to meet the standards for disgorgement under Section 1964(a). The Government's model calculates "proceeds" on cigarettes smoked by the "youth- addicted population." *See* Motion, at 3. Defendants argue that such a calculation does not estimate the effect of their alleged RICO violations on past cigarette sales. *Id.* at 9. Specifically, Defendants assert that the Government's attempt to

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[9] In *Richard*, the Fifth Circuit relied on *Carson* and rejected a claim for disgorgement under Section 1964(a). However, *Richard* is distinguishable from the instant case on its facts. In *Richard*, the parties from whom disgorgement was sought were no longer operating the business in which they had committed the racketeering acts. Moreover, unlike the Government in this case, the party seeking disgorgement in *Richard* failed to argue that disgorgement would prevent and restrain future violations. The Fifth Circuit concluded that "[a]bsent this argument, [plaintiff's] disgorgement claim seems to do little more than compensate for the alleged loss." *Richard*, 355 F.3d at 355. Accordingly, the analysis in *Richard* is not applicable to the instant case.

recapture all the "proceeds" from Defendants' sales to the "youth-addicted population" from 1971 to 2000 includes both gains from alleged RICO violations and gains from legitimate sales during this period. *Id.* at 4-5. Thus, Defendants argue, the Government has failed to meet its burden of identifying which proceeds are ill-gotten and therefore subject to disgorgement. *Id.* at 8.

In addition, Defendants contend that the Government improperly made an "additional gains" adjustment to its calculation of the economic model, which resulted in pre-judgment interest of $204 billion, or 73 percent of the $280 billion sought. *Id.* at 14-15. Defendants also maintain that the Government failed to tailor its disgorgement request to amounts necessary to "prevent and restrain" future RICO violations, as Section 1964(a) requires. *Id.* at 18. In light of these and other alleged flaws in the Government's model, Defendants claim that the Government cannot satisfy the legal standards for obtaining disgorgement.

In response, the Government argues that its economic model need only be a reasonable approximation of ill-gotten gains. *See* Govt's Opp'n., at 5. The Government asserts that, in light of Defendants' massive and pervasive scheme to defraud, the law does not require a precise calculation of ill-gotten gains because "separating legal from illegal profits exactly may at times be a near-impossible task." *Id.* In addition, the Government claims that the "additional gains" adjustment to its economic model is well established and appropriate. *Id.* at 6.

The foregoing recitation of the parties' positions makes it eminently clear that there are genuine disputes over material facts which must be considered in the calculation of any disgorgement that may be

ordered by this Court upon a finding of liability. In order to make any judgment about the proper calculation of disgorgement amounts, the Court must hear the full explanations from the parties' experts about the economic models used. In short, a determination of whether the Government's economic model is accurate, adequate, or appropriate under Section 1964(a) is a fact-intensive inquiry that can only be resolved at trial. Summary judgment is, therefore, inappropriate.

III. CONCLUSION

For all the foregoing reasons, Defendants are not entitled to partial summary judgment dismissing the Government's disgorgement claim, and their Motion is **denied.**

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. CIV.A.99-2496 GK

UNITED STATES OF AMERICA, PLAINTIFF

v.

PHILIP MORRIS INCORPORATED, ET AL., DEFENDANTS

Sept. 28, 2000

MEMORANDUM OPINION

KESSLER, District Judge.

I. *Introduction*

Plaintiff, the United States of America ("the Government"), brings suit against eleven tobacco-related entities ("Defendants")[1] to recover health care expenditures the Government has paid for or will pay

[1] The eleven defendants are: Philip Morris, Inc. ("Philip Morris"), R.J. Reynolds Tobacco Co. ("R.J. Reynolds"), Brown & Williamson Tobacco Co. ("Brown & Williamson"), Lorillard Tobacco Company ("Lorillard"), The Liggett Group, Inc. ("The Liggett"), American Tobacco Co. ("American Tobacco"), Philip Morris Cos., B.A.T. Industries p.l.c. ("BAT Ind."), British American Tobacco (Investments) Ltd., The Council for Tobacco Research—U.S.A., Inc. ("CTR"), and The Tobacco Institute, Inc. ("TI"). The latter two entities do not manufacture or sell tobacco products, but are alleged to be co-conspirators in Defendants' tortious activities.

for to treat tobacco-related illnesses allegedly caused by Defendants' tortious conduct. The Government also asks this Court to enjoin Defendants from engaging in fraudulent and other unlawful conduct and to order Defendants to disgorge the proceeds of their past unlawful activity.

The Government makes four claims against Defendants under three statutes. The first statute, the Medical Care Recovery Act ("MCRA"), 42 U.S.C. §§ 2651-2653, provides the Government with a cause of action to recover certain specified health care costs it pays to treat individuals injured by a third-party's tortious conduct (Count 1). The second statute is a series of amendments referred to as the Medicare Secondary Payer provisions ("MSP"), 42 U.S.C. § 1395y, which provides the Government with a cause of action to recover Medicare expenditures when a third-party caused an injury requiring treatment and a "primary payer" was obligated to pay for the treatment (Count 2). The third statute is the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968 (Counts 3 and 4), which provides parties with a cause of action to recover treble damages due to injuries they received from a defendant's unlawful racketeering activity, and to seek other equitable remedies to prevent future unlawful acts.

This matter is now before the Court on Defendants' motions to dismiss for failure to state a claim.[2] Upon consideration of the motions, oppositions, replies, the applicable case law, the arguments presented at the

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[2] Defendant BAT Ind.'s motion to dismiss for lack of personal jurisdiction is addressed in a separate Memorandum Opinion issued the same day as this Opinion.

motions hearing, and the entire record herein, for the reasons discussed below, the Non-Liggett Defendants' motion to dismiss for failure to state a claim [# 72] is **granted** as to the MCRA claim (Count 1), **granted** as to the MSP claim (Count 2), and denied as to the RICO claims (Counts 3 and 4). Liggett's separate motion to dismiss for failure to state a claim [# 70] is denied.

Summary of Legal Conclusions

The United States Government has brought this massive civil action against the tobacco industry, seeking billions of dollars in damages for what it alleges to be a lengthy unlawful conspiracy to deceive the American public about the health effects of smoking and the addictiveness of nicotine. In order to prevail on these allegations, the Government has offered three distinct legal theories of liability. Two of these theories are being rejected, and therefore, Counts 1 and 2 of the Complaint will be dismissed. A significant portion of the Government's case, however, will go forward, namely its claims under RICO for disgorgement of all profits Defendants derived from activities, beginning in 1953 and continuing to the present, related to the alleged pattern of racketeering activity. Consequently, Counts 3 and 4 of the Complaint will proceed. In sum, while the Government's theories of liability have been limited, the extent of Defendants' potential liability remains, in the estimation of both parties, in the billions of dollars. The scope and complexity of this case will continue to pose significant challenges to the parties and to the Court.

1. The Government's Medical Care Recovery Act claim will be dismissed. The congressional intent in enacting MCRA in 1962—at which time Medicare did not exist and the Federal Employees Health Benefits

Act ("FEHBA")[3] was still in its infancy—was to provide a means for the Government to recover from third-party tortfeasors[4] medical expenses it had furnished for (primarily military) employees. Applying the principles from a recent U.S. Supreme Court decision, *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 120 S. Ct. 1291, 146 L. Ed. 2d 121 (2000), this Court concludes that Congress did not intend that MCRA be used as a mechanism to recover Medicare or FEHBA costs. The Court reaches this conclusion after examining the broad context in which MCRA has existed for 38 years—including its legislative history, the construction given it by those agencies charged with its interpretation, a body of long- standing state and federal case law, and its total non-enforcement by the Department of Justice for thirty-seven of those thirty-eight years.

2. The Government's Medicare Secondary Payer claim will also be dismissed. MSP permits the Government to seek reimbursement from insurance entities, when Medicare has paid for health care expenses for which those entities should have paid. Although MSP also allows the Government to bring suit against non-insurance entities required to pay for health care costs under a "self-insured plan," the Government's Complaint contains no allegation that Defendants have at any time maintained a "self-insured plan," as that term is defined by MSP and the relevant regulations. Further, it is clear that Congress did not intend MSP to be used as an across-the-board procedural vehicle for

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[3] FEHBA is codified at 5 U.S.C. § 8901 *et seq.*

[4] A "tortfeasor" is an individual or entity that commits a civil wrong for which a remedy, usually monetary damages, may be obtained. *See* Black's Law Dictionary (7th ed. 1999).

suing tortfeasors, which is precisely how the Government attempts to use the statute in this case.

3. The Government's Racketeer Influenced and Corrupt Organization Act claims will be permitted to go forward. The Government has adequately alleged, which is all it must do at this early stage in the litigation, the necessary elements of a RICO claim: that Defendants formed an "enterprise" which engaged in the requisite "pattern of racketeering activity." In addition, given the nature and scope of Defendants' alleged prior misconduct, the Government has adequately pleaded its basis for requesting injunctive relief, including the specific remedy of disgorgement.[5]

II. *Standard of Review*

A "complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957); *see also Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 654, 119 S. Ct. 1661, 143 L. Ed. 2d 839 (1999). At the motion to dismiss stage, "the only relevant factual allegations are the plaintiffs'," and they must be presumed to be true. *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1506 (D.C. Cir. 1984), *vacated on other grounds*, 471 U.S. 1113, 105 S. Ct. 2353, 86 L. Ed. 2d 255 (1985); *Shear v. National Rifle Ass'n of Am.*, 606 F.2d 1251, 1253 (D.C. Cir. 1979). Despite the sweeping breadth and seriousness of the Government's allega-

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[5] "Disgorgement" is defined as the "act of giving up something (such as profits illegally obtained) on demand or by legal compulsion." *See* Black's Law Dictionary (7th ed.1999).

tions, their validity is not for this Court to judge at this time.

III. *Statement of Facts*

The Government's Complaint describes in detail what it alleges to be a four-decade long conspiracy, dating from at least 1953, to intentionally and willfully deceive and mislead the American public about, among other things, the harmful nature of tobacco products, the addictive nature of nicotine, and the possibility of manufacturing safer and less addictive tobacco products. Complaint ("Compl.") at ¶ 3. Defendants' conspiratorial activity includes making numerous "false and deceptive" statements and concealing documents and research in an attempt to cover-up their deceit. Compl. at ¶ 5. According to the Government, Defendants continue to "prosper and profit" from their actions and will continue to do so into the future, unless restrained by this Court. Compl. at ¶ 6. The specifics of the alleged conspiracy are described below.

"In the 1940's and early 1950's, scientific researchers published findings that indicated a relationship between cigarette smoking and diseases, including lung cancer." Compl. at ¶ 30. Tobacco companies "closely monitored" this research, conscious that if the public became aware of these findings, the companies' profits would likely decline and they would "face the prospect of civil liability and government regulation." Compl. at ¶ 31. To combat these possibilities, the chief executives of Defendants American Tobacco, Brown & Williamson, Lorillard, Philip Morris, and R.J. Reynolds met in late 1953 in New York City, where they devised a concerted strategy to preserve and expand the market for, and profits from, cigarettes. Compl. at ¶ 32.

According to the Government, the underlying strategy Defendants adopted was simple: to deny that smoking caused disease and to consistently maintain that whether smoking caused disease was an "open question." Compl. at ¶ 34. To maintain and further this strategy, Defendants issued deceptive press releases, published false and misleading articles, destroyed and concealed documents which indicated that there was in fact a correlation between smoking and disease, and aggressively targeted children as potential new smokers. Compl. at ¶ 36.

One of the first major steps Defendants took was to announce the formation of an entity initially known as the Tobacco Industry Research Committee ("TIRC") and which later became known as the Council for Tobacco Research ("CTR" or "Council").[6] This entity, which Defendants publicized widely as an objective research body, published in January 1954 a full-page statement that ran in 448 newspapers throughout the United States. Titled "A Frank Statement to Cigarette Smokers," the statement asserted that, according to "distinguished authorities," "there is no proof that cigarette smoking is one of the causes" of lung cancer. Compl. at ¶ 37. Defendants further stated: "We believe the products we make are not injurious to health" —even though Defendants' own employees had by this time "identified the carcinogenic substances in tobacco smoke." Compl. at ¶ ¶ 37, 38. Promising to aid and assist research into all phases of tobacco use and health and to provide complete information to the public, the publication stated that the newly formed Council would

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[6] According to the Government, Defendant Liggett did not join the Council until 1964. Compl. at ¶ 41.

perform independent, objective, and reliable research about the allegations against smoking. Compl. at ¶ 37.[7]

According to the Government, CTR was not independent, objective or reliable. Its purpose was not to research issues of concern to the public, but rather to serve as a "front" or "cover" for Defendants' conspiracy to conceal the truth about smoking's health risks. Compl. at ¶ 60. Defendants used CTR to fund "Special Projects" that were devised to counter evidence of smoking's adverse health effects by providing alternative explanations for tobacco-related diseases. Compl. at ¶ 65.

The Government alleges that these projects were designed largely to generate research data and witnesses for use in defending lawsuits and opposing tobacco regulation, rather than to ascertain or improve the safety of Defendants' products. To accomplish this objective, Defendants put attorneys in control of the Council's research and devised strategies to withhold from civil discovery critical information about the health effects of cigarette smoking by improperly invoking the attorney-client privilege and work-product doctrine. *Id.* If CTR research ever "threatened to confirm the link between smoking and disease," Defendants exerted pressure on the scientists conducting the research, so as to alter the results, terminate the research, and/or conceal the findings. Compl. at ¶ 67.

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[7] Defendants also established a Scientific Advisory Board ("SAB"), which they claimed was an independent research arm of the CTR. Compl. at ¶ 61. The Government disputes this, alleging that the SAB was "closely controlled" by Defendants to prevent it from approving research that suggested any link between smoking and disease. Compl. at ¶ 62.

In 1958, Defendants created another entity, the Tobacco Institute ("TI"), a "public relations organization" whose function was to keep the public, the medical establishment, the media and the government in the dark about tobacco's health risks, especially the "connection between smoking and disease." Compl. at ¶ 42.

Defendants also entered into what they termed a "gentleman's agreement" not to perform in-house research on smoking, health, or the development of "safe" cigarettes. Compl. at ¶ 45. Each Defendant enforced this agreement—a central tenet of the conspiracy—by obstructing research efforts by any other company. Even when individual companies performed limited in-house research, the fundamental understanding remained intact: information that would tend to establish the harm caused by cigarette smoking would be suppressed and concealed. Compl. at ¶ 48.

The Government alleges that over the course of the conspiracy, Defendants have made numerous misstatements concerning one item in particular: nicotine. Defendants continually denied that nicotine is addictive, even in the face of overwhelming evidence to the contrary. Compl. at ¶ ¶ 71-72. For example, Defendant Brown & Williamson acknowledged internally in 1963 that "we are . . . in the business of selling nicotine, an addictive drug." Comp. at ¶ 72. Researchers hired by Philip Morris in the 1980's concluded that "in terms of addictiveness, 'nicotine looked like heroin'." Compl. at ¶ 73. Instead of making these results public, however, Defendant Philip Morris threatened the researchers with legal action, killed the lab animals, removed the lab equipment and closed the lab down entirely. *Id.*

And in 1963, Defendant Brown & Williamson deliberately withheld from the Surgeon General research on the addictiveness of nicotine. Compl. at ¶ 74. When the Surgeon General finally concluded, based on independent research, that nicotine is in fact addictive, TI attacked and criticized the report as "an unproven attempt to find some way to differentiate smoking from other behaviors." *Id.* Defendants have engaged in these and numerous other acts of deception because they recognize that "getting smokers addicted to nicotine is what preserves the market for cigarettes and ensures their profits." Compl. at ¶ 71.

Not only have Defendants denied the addictive powers of nicotine, but it is alleged that they have also taken non-public actions to increase its potency and make cigarettes even more addictive. Despite having used "highly sophisticated technologies," including the selective breeding and cultivation of tobacco plants, to manipulate and increase the potency of nicotine in their cigarettes, Compl. at ¶ 77, Defendants have repeatedly denied that they manipulated the level of nicotine in their products. Compl. at ¶ 79. A 1994 R.J. Reynolds advertisement, for example, states: "We do not increase the level of nicotine in any of our products in order to addict smokers." Compl. at ¶ 81. Defendants also marketed "light" or "low tar/low nicotine" cigarettes as being less hazardous to smokers, Compl. at ¶ 86, even though individuals who smoke such cigarettes are "not appreciably reducing their health risk." Compl. at ¶ 88.

The Government also alleges that Defendants suppressed research regarding less hazardous cigarettes. Phillip Morris, for example, conducted research which concluded that a "medically acceptable low-carcinogen cigarette may be possible," but this finding was never

released to the public. Compl. at ¶ 105. Indeed, Defendants have refused to acknowledge the possibility of such a cigarette. Compl. at ¶¶ 108, 109.

The Government charges that Defendants have "aggressively targeted their campaigns to children." Compl. at ¶ 96. R.J. Reynolds' Joe Camel campaign is just one of the most well-known examples of such tactics. Compl. at ¶ 97. Defendants have advertised in stores near high schools, promoted brands heavily during spring and summer breaks, given away cigarettes at places where young persons congregate, paid for product placement in movies with youth audiences, placed advertisements in magazines with high youth readership, and sponsored sporting events, rock concerts, and other events of interest to children. Compl. at ¶ 96. Defendants have consistently made false and misleading statements that their expenditures on advertising and marketing were directed exclusively at convincing current smokers to switch brands, not at enticing children. Compl. at ¶ 100.

The Government maintains that all the above misstatements, and fraudulent and conspiratorial activity are ongoing. Although Defendants have now admitted that there is "a substantial body of evidence which supports the judgment that cigarette smoking plays a causal role in the development of lung cancer and other diseases in smokers," Compl. at ¶ 116, and have conceded that cigarettes are "addictive," as that term is used by the public at large. Compl. at ¶ 120, Defendants still market their products in deceptive and unlawful ways; they conceal documents relating to the health effects of cigarettes, nicotine and the true nature of CTR; and they continue to pose a threat "to the

health and well-being of the American public." Compl. at ¶ 124.

The Government alleges that the harm caused by the Defendants' decades-long conspiracy has compelled numerous entities, including the government, to expend immense resources to treat, alleviate and minimize the resulting disease and devastation. Compl. at ¶ 6. In this action, the Government seeks to recover some or all of the "$20 billion annually" it has spent to treat the "injuries and diseases caused by defendants' products." Compl. at ¶ 5. It also seeks various forms of equitable relief, including the disgorgement of Defendants' profits, to deter Defendants and others from engaging in similar conduct in the future.

IV. *Defendants' Motion To Dismiss*[8]

A. The Government's Medical Care Recovery Act Claim

In 1962, Congress enacted the Medical Care Recovery Act ("MCRA"), which provides in pertinent part:

> In any case in which the United States is authorized or required by law to furnish [or pay for][9] hospital, medical, surgical, or dental care and treatment . . . to a person who is injured or suffers a disease, . . . under circumstances creating a tort liability upon some third person . . . to pay damages therefore, the United States shall have a right to recover (independent of the rights of the injured or diseased

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[8] Section IV specifically addresses arguments raised by the Non-Liggett Defendants but applies equally to Liggett, which has joined in this Motion.

[9] The bracketed language was added by a 1996 amendment. *See* Pub.L. No. 104-201, § 1075, 110 Stat. 2442, 2663 (1996).

> person) from said third person, or that person's insurer, the reasonable value of the care and treatment so furnished, to be furnished, paid for, or to be paid for and shall, as to this right be subrogated to any right or claim that the injured or diseased person . . . has against such third person . . .

42 U.S.C. § 2651(a), Pub. L. No. 87-693, § 1, 76 Stat. 593 (1962).

At first blush, MCRA's language might seem quite clear. The statute generally provides the Government with a means to recover from tortfeasors the health care costs it has expended on behalf of victims of tortious conduct. If the Government has "paid for" or "furnished" such care, it may seek reimbursement from the individual or entity that caused the injury. The statute is broadly worded: Congress could have restricted the Government's ability to obtain reimbursement in any number of ways, both substantively and procedurally, but it did not.

However, the specific question before this Court—and it is a difficult one the resolution of which has enormous ramifications—is whether MCRA, a statute enacted in 1962 and amended in a minor fashion in 1996, covers, or was intended by Congress to cover, payments made by the United States Government under Medicare and the Federal Employees Health Benefits Act ("FEHBA")[10] to treat tobacco-related illnesses allegedly caused by Defendants' tortious conduct.

Only a few months ago, the Supreme Court grappled with an equally difficult issue of statutory interpretation in *FDA v. Brown & Williamson Tobacco Corp.*,

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[10] FEHBA is codified at 5 U.S.C. § 8901 *et seq.*

529 U.S. 120, 120 S. Ct. 1291, 146 L. Ed. 2d 121 (2000), a case in which it had to decide whether the Food and Drug Administration possessed authority to regulate tobacco products as customarily marketed. While this Court fully recognizes that the present case, unlike *Brown & Williamson*, does not involve "an administrative agency's construction of a statute," thereby triggering the two-step *Chevron* analysis,[11] 120 S. Ct. at 1300 (citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984)), the general analytical approach followed in *Brown & Williamson* as it relates to statutory construction and congressional intent is nevertheless instructive and illuminating. Like the Supreme Court in *Brown & Williamson*, this Court's obligation is to ascertain congressional intent by viewing a particular statute in the context of relevant congressional action taken during and subsequent to its enactment. Accordingly, there are significant principles articulated by the *Brown & Williamson* Court that speak to how the instant case should be resolved.

One such principle is that subsequent legislative action may shed light on congressional intent. "At the time a statute is enacted, it may have a range of plausible meanings. Over time, however, subsequent acts can

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[11] Even assuming that the Department of Justice should be considered an "agency" for purposes of *Chevron* analysis, it is entitled to no deference for its interpretation of MCRA, FEHBA or Medicare, because it is not the agency entrusted to administer those statutes. "[W]hen an agency interprets a statute other than that which it has been entrusted to administer, its interpretation is not entitled to deference." *Illinois Nat'l Guard v. Federal Labor Relations Authority*, 854 F.2d 1396, 1400 (D.C. Cir. 1988) (citations and internal quotations omitted).

shape or focus those meanings." 120 S. Ct. at 1306.[12] In adopting subsequent statutes, Congress is presumed to act "against the backdrop" of agency statements regarding the parameters of the agency's authority to act under the original statute. *Id.* at 1306-07.

Another such principle is that agency "interpretations and practices" should be given "considerable weight where they involve the contemporaneous construction of a statute and where they have been in long use." *Davis v. United States*, 495 U.S. 472, 484, 110 S. Ct. 2014, 109 L. Ed. 2d 457 (1990). In fact, congressional action (or inaction) can, in certain circumstances, be viewed by courts as having "effectively ratified" an agency's long-standing position. 120 S. Ct. at 1307.[13]

A final principle announced by the Supreme Court—and one which has more concrete application in the instant case—is that Congress, "for better or for worse, has created a distinct regulatory scheme for tobacco products." 120 S.Ct. at 1315. In conjunction with this scheme, "Congress has persistently acted to

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[12] To the extent that the Government contends that the question presented can be resolved by resort to MCRA's language alone, *see* Govt's Opp'n at 14-15, its argument is flatly inconsistent with *Brown & Williamson*'s requirement that statutes like MCRA be viewed in the context of "subsequent acts."

[13] *Brown & Williamson* was certainly not the first occasion in which the Supreme Court expressed such a view. In *FTC v. Bunte Bros*, 312 U.S. 349, 352, 61 S. Ct. 580, 85 L. Ed. 881 (1941), the Court stated: "Just as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred." *See also Bankamerica Corp. v. United States*, 462 U.S. 122, 130, 103 S. Ct. 2266, 76 L. Ed .2d 456 (1983).

preclude a meaningful role for any administrative agency in making policy on the subject of tobacco and health." *Id.* at 1313; *see also id.* at 1309 (Congress' intent was to "preclude any administrative agency from exercising significant policymaking authority on the subject of smoking and health"); *id.* at 1315 (Congress has "repeatedly acted to preclude any agency from exercising significant policymaking authority in the area").

The principles delineated above lead this Court to the conclusion that Congress did not intend MCRA to cover Medicare or FEHBA expenses.

1. Legislative History

Recourse to MCRA's legislative history cannot by itself answer the question presented (*i.e.*, whether MCRA applies to Medicare and FEHBA expenses), since the record relating to the statute's enactment is virtually non-existent. Nevertheless, even the sliver of legislative history that does exist provides the Court with "guidance" in understanding how Congress meant MCRA to be interpreted. *See National Wildlife Federation v. Snow*, 561 F.2d 227, 237 (D.C. Cir. 1976); *American Soc'y of Travel Agents v. Blumenthal*, 566 F.2d 145, 166 (D.C. Cir. 1977) ("Legislative history can be and often is an important instrument in the determination of congressional intent.") (Bazelon, C.J., dissenting).

The parties agree, and the legislative history confirms, that MCRA was enacted in response to a 1947 Supreme Court decision, *United States v. Standard Oil Co.*, 332 U.S. 301, 67 S. Ct. 1604, 91 L. Ed. 2067 (1947), which held that the Government lacked a common law cause of action to recover from tortfeasors expenses the

Government had incurred in treating military personnel under its health care programs. *Id.* at 314-16, 67 S. Ct. 1604. *Standard Oil* narrowly construed the Government's authority to recover such expenditures and directed Congress to enact appropriate legislation if it wished to provide the Government with more expansive authority. *Id.* at 315-16, 67 S. Ct. 1604.

For over a decade, Congress apparently ignored *Standard Oil* and did nothing to provide the Government with a statutory cause of action to recover the medical expenses resulting from care it had provided. Finally, in 1960, thirteen years after *Standard Oil* was handed down, the Comptroller General of the United States submitted a Report to Congress entitled "Report On Review Of The Government's Rights And Practices Concerning Recovery Of The Cost Of Hospital And Medical Services In Negligent Third-Party Cases." *See* Govt's Opp'n, Appendix ("App.") at 5. The Report's purpose was to "ascertain the extent, adequacy, and consistency of the rights and practices of the Government to recover" the costs of health care it furnished to tort victims. *Id.* In particular, the Report reviewed the ability of four government agencies to recover their medical costs: the Department of Defense, the Veterans Administration, the Department of Health Education and Welfare's Public Health Service, and the Labor Department's Bureau of Employees' Compensation. *Id.* at 6.

The Report explicitly referred to *Standard Oil* and what the Comptroller General determined the consequence of that decision to be, namely, that "each year the Government is not recovering several million dollars of costs in negligent third-party cases." *Id.* at 14. The Report labeled this outcome "inequitable" and

declared that "the Government should have the right in all cases to recover its costs of treating those injured as a result of the negligence of third parties." *Id.* at 10. The Comptroller General therefore recommended that Congress adopt one of two options for remedying the problem: enact legislation "in the form of either a general bill" or amend the statutes governing "the specific agencies involved." *Id.* at 10, 20-21. It should be remembered that Medicare, enacted in 1965, did not exist when the Comptroller General issued his report, in 1960, but FEHBA did.

In response to the Comptroller General's Report, Congress chose the alternative of enacting "a general bill" rather than amending statutes agency by agency. According to the Senate Report on MCRA, the statute's "purpose" was to

> provide for the recovery by the United States from negligent third persons for the cost of hospital, medical, surgical, or dental care and treatment furnished by the United States, pursuant to authority or requirement of law, to a person who is injured or suffers a disease under circumstances creating a tort liability upon such third person.

S. Rep. No. 87-1945 (1962), *reprinted in* 1962 U.S.C.C.A.N. 2637, 2637 (under heading "Purpose"). Both the House and Senate Reports state that MCRA would enable the Government to recover expenses under "[s]tatutes providing for care by the Department of Defense to military personnel and their dependents, the Public Health Service to Coast Guard personnel and other classes of persons, and the Veterans' Administration to veterans." *Id.* at 2639; H. Rep. No. 87-1534, at 5 (1962).

While this language would, by itself, suggest an intent to limit MCRA to the cost of health care provided to members of the military, the very next paragraph of the Senate Report discusses the manner in which the Government would be able to recover payments made under the Federal Employees' Compensation Act ("FECA").[14] Since that statute covers civilian employees, it is clear that MCRA was not meant to be restricted to the military.

The three documents described above (the Comptroller General's Report, the Senate Report and the House Report) constitute MCRA's entire legislative history. However, even more significant than what the legislative history does contain (very little) is what it does not. Despite the fact that the Comptroller General's Report expressly refers to FECA—which both parties agree is covered under MCRA—nowhere in the Report is any mention made of FEHBA, the wide-ranging civilian health insurance program which had been enacted several years earlier, and which the Government now claims is also covered by MCRA. Nor did the Senate or House Reports refer to FEHBA, even in passing. These omissions are, if not in direct conflict, at least in sharp tension with the Government's position that MCRA applies to FEHBA. Surely, Congress knew of FEHBA's existence, especially since that statute had been enacted only five years before MCRA.

Although the legislative history, and particularly Congress' failure to make any mention of FEHBA after specifically mentioning other programs covered by the statute, would by itself suggest that MCRA was not

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[14] FECA is codified at 5 U.S.C. § 8132, and provides for unemployment compensation benefits.

meant to apply to FEHBA, the paucity of legislative history necessitates a review of other considerations relating to congressional intent.[15]

2. Agency Interpretations

Another tool for ascertaining congressional intent is to examine the statements, rulings and interpretations of government agencies—particularly those agencies entrusted to administer the relevant statute. Because the Health Care Financing Administration ("HCFA") is the agency charged with administering MCRA, its approach to enforcing that statute should be given special attention.

As an initial matter, it cannot be overlooked that HCFA has issued no MCRA-specific regulations pro-

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[15] The Government contends that there is an additional piece of legislative history relating to Medicare, not MCRA, which supports its interpretation of MCRA. The Senate Report accompanying the original Medicare Act states that Medicare will not pay "for any item or service furnished an individual if neither the individual nor any other person (such as a prepayment plan) has a legal obligation to pay for or provide the services," and that under such a circumstance, "the third-party liability statute 42 U.S.C. §§ 2651-2653 [MCRA] would not apply." S. Rep. No. 89-404, at 48 (1965), *reprinted in* 1965 U.S.C.C.A.N. 1943, 1989. Although the Government argues that this is a clear indication that Congress intended MCRA to apply to Medicare expenses, Govt's Opp'n at 17, the Court finds this "oblique reference" to the MCRA statute inconclusive at best, especially when it is evaluated in the larger context of near total congressional silence concerning any connection between MCRA and the mammoth Medicare program. *See Regular Common Carrier Conference v. United States*, 820 F.2d 1323, 1328 (D.C. Cir. 1987) (finding that "it strains credulity to suggest . . . that [a] Senate Report's oblique reference" to a certain exemption "reflects an otherwise unarticulated intent" to apply that exemption in a way never otherwise mentioned in the legislative history).

viding for recovery of Medicare or FEHBA costs. In contrast, agencies that do have, and have always had, an undisputed and established right to recovery under MCRA, such as those governing the armed services, do have such regulations in place. *See* 32 C.F.R. § 199.12 (Civilian Health and Medical Program of the Uniformed Services ("CHAMPUS") MCRA regulations); 32 C.F.R. §§ 842.115-842.125 (Air Force MCRA regulations); 32 C.F.R. § § 757.11-757.20 (Navy MCRA regulations); 33 C.F.R. § 25.131 (Coast Guard MCRA regulations).[16] No

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[16] For example, the regulations governing MCRA-recovery of expenses incurred under CHAMPUS require any person furnished care and treatment under CHAMPUS

> (i) To provide complete information regarding the circumstances surrounding an injury as a condition precedent to the processing of a CHAMPUS claim involving possible third-party liability.
>
> (ii) To assign in writing to the United States his or her claim or cause of action against the third person to the extent of the reasonable value of the care and treatment furnished, or to be furnished, or any portion thereof;
>
> (iii) To furnish such additional information as may be requested concerning the circumstances giving rise to the injury or disease for which care and treatment are being given and concerning any action instituted or to be instituted by or against a third person;
>
> (iv) To notify the responsible recovery judge advocate, the CHAMPUS fiscal intermediary or General Counsel, OCHAMPUS, or other officer who is representing the interests of the government at the time, of a settlement with, or an offer of settlement from a third person; and,
>
> (v) To cooperate in the prosecution of all claims and actions by the United States against such third person.

such structure has ever been established by HCFA to collect Medicare or FEHBA expenses under the general MCRA framework.

Moreover, several agencies have explicitly concluded that MCRA does not provide the Government with a cause of action to recover Medicare costs. First, in 1968, the General Counsel of the Federal Bureau of Health Insurance (which administered Medicare at that time) issued an Opinion to that effect, stating that Medicare payments are "insurance benefits," as distinguished from the health care "provided directly by the federal government" to which MCRA clearly applied. *See Subrogation Rights Under Medicare*, For the Defense, Apr. 1970, at 44 (Defs.' Mem., App. J at 67). Second, in 1979, HCFA issued a ruling that, in cases in which the Government was liable for an injury under the Federal Tort Claims Act ("FTCA") and Medicare paid the medical expenses, the victim could retain all payments the Government made to her under the FTCA. *See* HCFA Ruling 79-4 (1979), *reprinted in* 52 Fed. Reg. 26,088, 26,090 (1987). The rationale underlying this ruling (that Medicare was not to receive any reimbursement for the care it had provided to the injured person) was that Medicare was "in the nature of social insurance." *Id.*

Since MCRA's enactment in 1962, neither HCFA nor any other administrative agency has ever indicated, or even suggested, that MCRA applies to Medicare or FEHBA expenses. These agency statements and silences, taken in conjunction with the absence of regula-

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32 C.F.R. § 199.12(e)(2). None of the above mentioned actions is required of recipients of health care under Medicare or the FEHBA program.

tions that would formalize and facilitate the Government's recovery of Medicare or FEHBA costs under MCRA, lend further credence to Defendants' position that MCRA was never meant to apply to Medicare or FEHBA expenses.

3. Application of the *Brown & Williamson* Principles

Having considered both the legislative history and agency interpretations of MCRA, the Court's final task is to apply the *Brown & Williamson* principles enunciated in Section IV.A.1 to discern what Congress' intent was in enacting MCRA in 1962 and amending it in 1996. Based on this examination, the Court must conclude that MCRA does not provide the Government with a cause of action to recover Medicare or FEHBA expenses. The legislative history and relevant agency conduct, when taken together, overwhelmingly support the notion that MCRA was never intended to be used in the way the Government now advocates.

First, it is significant that even though FEHBA existed *before* MCRA's enactment, MCRA makes *no* reference to FEHBA—either in the statute itself, in the legislative history or in agency interpretations.

Second, it is striking that the Government had never, prior to the initiation of this lawsuit in 1999, attempted to recover Medicare or FEHBA costs under MCRA. Although the Government is correct that mere nonuse of a statute cannot cause the Government to forfeit powers granted thereunder, *see United States v. Morton Salt Co.*, 338 U.S. 632, 647-48, 70 S. Ct. 357, 94 L. Ed. 401 (1950), nonuse can be highly significant. When, despite many opportunities to do so, a government agency refuses to take advantage of the wide-

ranging powers seemingly implicated by a statute's plain language, courts may presume that Congress did not intend the statute to be given the meaning that its language, in a vacuum, might imply. *See Brown & Williamson*, 120 S. Ct. at 1306-07; *see also Bankamerica Corp.*, 462 U.S. at 130-31, 103 S. Ct. 2266 (holding that where Government had not applied a statute in a particular way in 60 years, it had effectively acknowledged that it lacked authority to do so); *Bunte Bros.*, 312 U.S. at 352, 61 S. Ct. 580; *National Classification Comm. v. United States*, 746 F.2d 886, 892 (D.C. Cir. 1984). This is particularly true in this instance, where the broader interpretation of MCRA (*i.e.*, that every conceivable type of government expenditure, even under Medicare and FEHBA, can be recovered under MCRA) had *never* been advanced by any government entity until thirty-seven years after the statute's enactment.

Third, Congress is presumed to act "against the backdrop" of HCFA's interpretations of the statutes HCFA is entrusted to administer. *See Brown & Williamson, 120 S. Ct. at 1306-07. HFCA consistently indicated that it did not understand MCRA to cover Medicare or FEHBA expenses, and Congress never expressed any disapproval with HFCA's readings of MCRA. In fact, Congress' enactment of the 1996 amendment to MCRA, which the parties agree codified the existing manner in which MCRA was being enforced, can be viewed as a ratification of HFCA's consistent and narrow interpretation of that statute. 120 S. Ct. at 1307. Congress had the opportunity to express its displeasure with the restrictive way in which MCRA was being enforced, but it did not do so.*

Finally, given Congress' intense involvement in legislative regulation of tobacco,[17] and its keen awareness of "tobacco's health hazards and its pharmacological effects," 120 S. Ct. at 1313, it is simply impossible to conclude that the Government's current interpretation of MCRA, either in its original or in its 1996 amended form, is one that Congress intended. In fact, the Government's reading is in direct tension with Congress' recognized intent to create a "distinct scheme to regulate the sale of tobacco products, focused on labeling and advertising, and premised on the belief that the FDA lacks such jurisdiction under the FDCA." *Id.* at 1313. It is therefore particularly difficult to believe that Congress would have intended to subject tobacco companies to extraordinary financial liability under MCRA, when those entities are not even subject to rudimentary FDA regulation.

Congress has, through hearings and legislation, closely monitored the cigarette industry. While, over the years, it may not have adopted the aggressive, pro-consumer and pro-health stance that many activists have continually fought so hard for, the inescapable fact is that Congress chose, as a legislative body, to use only limited measures to regulate tobacco products and minimize their health hazards to the public. In light of all these considerations, it is simply inconceivable that the executive branch possessed for so many years (thirty-seven for FEHBA and thirty-four for Medicare) a statutory weapon that could wield the economic, and therefore regulatory, clout MCRA would carry if enforced as the Government advocates. This is especially true given that there has never been any congressional

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[17] For a detailed chronology of congressional action in this area, *see Brown & Williamson*, 120 S. Ct. at 1305-12.

recognition that this substantial power existed or congressional demand that it be utilized. Congress' total inaction for over three decades "preclude[s] an interpretation" of MCRA that would permit the Government to recover Medicare and FEHBA expenses.[18] *See Brown & Williamson*, 120 S. Ct. at 1312.

Accordingly, the Government's MCRA claim must be dismissed.

B. The Government's Medicare Secondary Payer Provisions Claim

The Medicare Secondary Payer provisions ("MSP"), a series of amendments to Medicare enacted in 1980 and further amended thereafter,[19] provide the Government

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[18] There is an additional reason that the Court reaches this conclusion. When Congress enacted the 1996 amendment, there was an existing body of case law concerning the "collateral source" doctrine in which federal and state courts have consistently and uniformly declared Medicare to be a separate and distinct "social insurance" fund into which citizens contribute. *See, e.g., District of Columbia v. Jackson*, 451 A.2d 867, 871-872 (D.C. 1982); *Molzof v. United States*, 6 F.3d 461, 466 (7th Cir. 1993); *Titchnell v. United States*, 681 F.2d 165, 174-76 (3d Cir. 1982). According to these cases, it is not the Government, but rather individuals, who "pay for" Medicare. If this Court were to rule in favor of the Government on the MCRA Count, it would effectively be declaring that the Government "pays for" Medicare, thus undermining the viability of a substantial and long-standing body of case law to the contrary.

[19] Pub.L. No. 97-35, § 988, 95 Stat. 604 (1981). The amendments are codified at 42 U.S.C. § 1395y, which provides in pertinent part:

> In order to recover payment under this subchapter for such an item or service, the United States may bring an action against any entity which is required or responsible (directly, as a third-party administrator, or otherwise) to make payment

with statutory authority to obtain reimbursement for certain Medicare expenditures. MSP essentially makes Medicare a "secondary" payer where another entity is required to pay under a "primary plan" for an individual's health care. *See* 42 U.S.C. § 1395y(b)(2). If the "primary" payer has an obligation to pay for such costs, but does not and cannot "reasonably be expected" to do so, Medicare may make a "conditional payment" and later demand reimbursement from the primary plan. 42 U.S.C. § 1395y(b)(2)(A) and (B)(ii). If the entity administering the primary plan refuses to reimburse, the Government may then bring suit against it to recover the Medicare payments.

A "primary plan" is defined in the statute as "a group health plan or large group health plan, . . . a workmen's compensation law or plan, an automobile or liability insurance policy or plan (*including a self-insured plan*) or no fault insurance . . ." 42 U.S.C. § 1395y(b)(2)(A) (emphasis added). A "self-insured plan" is in turn defined in the implementing regulations as an "*arrangement*, oral or written . . . to provide health benefits or medical care or [to] assume legal liability for injury or illness" under which an entity "carries its own risk instead of taking out insurance with a carrier." *See* 42 C.F.R. § § 411.21 (defining the term "plan") (emphasis added) and 411.50(b) (defining the term "self-insured plan").

It is this last phrase—"self-insured plan"—on which the Government rests its legal basis for Count 2 of this lawsuit. The Government's theory, as expressed in its

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with respect to such item or service (or any portion thereof) under a primary plan . . .

42 U.S.C. § 1395y(b)(2)(B)(ii).

Opposition to Defendants' Motion to Dismiss, is that Defendants have themselves assumed the liability stemming from tobacco-related tort suits and, therefore, as "self-insured" entities, may be sued under MSP.

To survive a motion to dismiss, a complaint "must allege all the material elements of [a] cause of action." *Taylor v. FDIC*, 132 F.3d 753, 761 (D.C. Cir. 1997) (internal citations omitted); *see also Croixland Properties Ltd. Partnership v. Corcoran*, 174 F.3d 213, 215 n.2 (D.C. Cir. 1999); *Alicke v. MCI Communications Corp.*, 111 F.3d 909, 912 (D.C. Cir. 1997).

The MSP Count of the Government's Complaint states simply that "defendants are required and responsible to make payment for the health care costs of Medicare beneficiaries that were caused by defendants' tortious and unlawful conduct, which costs have been and will be unlawfully shifted to the United States." Compl. at ¶ 170. The Complaint does allege, in other words, that Defendants are "required or responsible . . . to make payment" for certain health care costs, thus tracking a portion of the statute's language. *See* 42 U.S.C. § 1395y(b)(2)(B)(ii).

However, there are a number of "material elements"[20] of an MSP cause of action conspicuously absent from the Complaint. First, the Complaint does not allege, in even the most conclusory fashion, the existence of any "primary plan" under which Defendants pay health care costs, despite the fact that the statute on which the Government bases its claim applies only to entities required to make payment "under a primary plan." *See* 42 U.S.C. § 1395y(b)(2)(B)(ii). In fact, the Complaint does not even allege the existence of any

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[20] *See Taylor*, 132 F.3d at 761.

elements of a "primary plan," such as a "plan" or an "arrangement." *See* 42 C.F.R. § 411.21. Even if the Complaint had made such allegations, it still fails to allege, or even suggest, that Defendants specifically maintain any form of "*self-insured* plan" (emphasis added), even though this is the *only* theory on which the Government bases Defendants' liability.[21] Indeed, the Complaint does not allege that Defendants are "self-insured" in any way.

In those instances in which the Government has used MSP to seek recovery from entities that are unquestionably providers of insurance, as is certainly the typical factual scenario,[22] there has been no dispute

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[21] Although the Government argues *in its brief* that Defendants are a "self-insured plan," it does not make this allegation in the Complaint. In fact, the term "self-insured" appears only once in the entire Complaint. *See* Compl. at ¶ 168 (MSP provisions "provide that the Medicare Program will not pay for the cost of medical care if certain third parties—such as liability insurance plans, including self-insured plans—have paid, or can reasonably be expected to pay promptly for those costs). Indeed, the entire MSP Count occupies only slightly more than one page of the 87-page Complaint.

[22] Courts have uniformly recognized that the statute's clear purpose was to grant the Government a right to recover Medicare costs from insurance entities. *See, e.g., Perry v. United Food and Commercial Workers Dist. Unions 405 and 442*, 64 F.3d 238, 243 (6th Cir. 1995); *Baptist Memorial Hosp. v. Pan Am. Life Ins. Co.*, 45 F.3d 992, 998 (6th Cir. 1995); *Evanston Hosp. v. Hauck*, 1 F.3d 540, 544 (7th Cir. 1993); *see also Health Ins. Ass'n of Am. v. Shalala*, 23 F.3d 412, 427 n.* (D.C. Cir. 1994) ("[T]he MSP statute plainly intends to allow recovery only from an insurer.") (Henderson, J., concurring). What little legislative history exists is consistent with this interpretation. *See* H.R. Conf. Rep. No. 96-1479 (1980), *reprinted in* 1980 U.S.C.C.A.N. 5903, 5924. As of this time, there are no reported decisions in which the Government has sued a tortfeasor under MSP. One case, in which a private party has

regarding whether defendants maintain a "primary plan," since that term expressly includes a "group health plan," a "liability insurance policy or plan," and other traditional forms of insurance. *See* 42 U.S.C. § 1395y(b)(2). In those cases, the Government's allegation that defendants are "responsible" for certain health care costs is sufficient to state an MSP claim, as it gives "sufficient information to suggest that there exists some recognized legal theory upon which relief can be granted." *See Wells v. United States*, 851 F.2d 1471, 1473 (D.C. Cir. 1988) (internal citations and quotations omitted).

In the instant case, however, the claim of "responsibility" to make health care payments is entirely conclusory, since Defendants are clearly not insurance entities and the Complaint is devoid of any allegation that they have established a "plan" or "arrangement" under which they would be considered self-insured entities subject to MSP's reach. Without alleging the existence of such a "plan" or "arrangement," the Complaint's assertion that Defendants are "required and responsible to make payment" for certain health care costs fails to give Defendants even the most rudimentary notice of the Government's theory of liability. *See Wells*, 851 F.2d at 1473. Accordingly, the MSP count must be dismissed.

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brought such a suit, is currently being litigated. *See Mason v. American Tobacco Co.*, Civ. No. 7-97CV-293-X (N.D. Tex.).

C. The Government's Racketeer Influenced and Corrupt Organizations Claim

The Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § § 1961-1968, prohibits individuals or entities from engaging in racketeering activity associated with an "enterprise."[23] To successfully state a RICO claim, the Government must allege "(1) the conduct (2) of an enterprise (3) through a pattern of racketeering activity." *Salinas v. United States*, 522 U.S. 52, 62, 118 S. Ct. 469, 139 L. Ed. 2d 352 (1997) (citing *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 496, 105 S. Ct. 3275, 87 L. Ed. 2d 346 (1985)).

An enterprise includes "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." *United States v. Turkette*, 452 U.S. 576, 580, 101 S. Ct. 2524, 69 L. Ed. 2d 246 (1981) (quoting 18 U.S.C. § 1961(4)). "Racketeering activity" includes, among other things, acts prohibited by any one of a number of criminal statutes. 18 U.S.C. § 1961(1). A "pattern" is demonstrated by two or more instances of "racketeering activity" ("predicate acts") that occur within ten years of one another. 18 U.S.C. § 1961(5). In this case, the alleged predicate acts are violations of 18 U.S.C. §§ 1341 (mail fraud) and 1343 (wire fraud).

The Government brings its RICO counts (Counts 3 and 4) under two specific subsections of § 1962. Count 3 is brought under subsection (c), which makes it unlawful to "conduct or participate, directly or indirectly," in

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[23] Although RICO was originally enacted to "combat organized crime," its application has expanded far beyond that arena. *See, e.g., H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 248, 109 S. Ct. 2893, 106 L. Ed. 2d 195 (1989).

an enterprise through a "pattern of racketeering activity." Count 4 is brought under subsection (d), which makes it unlawful to "conspire to violate" subsection (c).

RICO provides both legal and equitable remedies. Plaintiffs may seek treble damages—that is, three times the value of the damages inflicted on them by a defendant's unlawful racketeering activity. 18 U.S.C. § 1964(c). In addition, the Court may in its discretion order equitable remedies, "including but not limited to" restricting defendants from taking future actions and even dissolving or restructuring the "enterprise."[24] In the instant case, the Government seeks to "disgorge" Defendants' past profits associated with and derived from their alleged unlawful racketeering activity, and to enjoin them from committing future RICO violations.[25]

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[24] Section 1964(a) states in full:

> The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, *including, but not limited to:* ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, *including, but not limited to,* prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

18 U.S.C. § 1964(a) (emphasis added).

[25] Specifically, the Government requests that the Court issue a "permanent injunction" to prohibit Defendants and their agents, employees and successors from (1) associating with persons known "to be engaged in [similar] acts of racketeering"; (2) participating in the management or control of CTR or TI; (3) making misleading

1. Future Injunctive Relief

Except for Liggett,[25] Defendants do not dispute that the Government has adequately alleged the elements of a RICO claim (*i.e.*, "enterprise," "racketeering activity, and "pattern"). What they do dispute is whether the Government has adequately alleged that Defendants' racketeering activity will continue into the future, so as to warrant the broad equitable relief sought.

The Government contends that the pattern of the past four decades in which the tobacco companies have made countless false and deceptive statements, concealed and destroyed documents, and improperly asserted legal privileges to evade legitimate civil discovery and government requests, establishes a "reasonable likelihood," *SEC v. Steadman*, 967 F.2d 636, 647 (D.C. Cir. 1992), that Defendants will continue to violate the law. Accordingly, the Government requests equitable relief in the form of disgorgement of the profits they have realized from their criminal activities,

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statements concerning cigarettes; and (4) engaging in "any public relations endeavor that misrepresents, or suppresses information concerning, the health risks associated with cigarette smoking or the addictive nature of nicotine." Compl. § VII.B.2.

The Government also requests that Defendants be ordered to (1) fund, but have no influence or control over, "a legitimate and sustained corrective public education campaign"; (2) disclose and disseminate documents relating to the targeting of children; (3) make "corrective statements regarding the health risks of cigarette smoking and the addictive properties of nicotine"; (4) fund, but have no influence or control over, "sustained [cigarette smoking] cessation programs"; and (5) fund, but have no influence or control over, "a sustained educational campaign devoted to the prevention of smoking by children. *Id.*

[25] Liggett's separate arguments will be addressed in Section V of this Opinion.

for the purpose of deterring Defendants and others from committing such acts in the future. Govt's Opp'n, at 92.

Defendants concede that "past allegations may be relevant to whether . . . a 'reasonable likelihood' exists" that such acts will continue into the future, Defs.' Mem. at 65, but argue that the Government's exclusive reliance on these past violations and its speculative allegations of future misconduct are too "conclusory" to justify equitable relief. Defs.' Mem. at 68. Defendants contend that, under the law of this Circuit, the Government may not rely solely on allegations of earlier unlawful activity to warrant the imposition of equitable relief. Defs.' Mem. at 66 n.* (citing *SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1228 (D.C. Cir. 1989)). Defendants also argue that, because the RICO predicate acts in this case involve mail and wire fraud, the command of Federal Rule of Civil Procedure 9(b) that allegations of fraud be made with "particularity" is applicable, and that the Government has failed to make the particularized showing required by this Rule. Defs.' Mem. at 67-68.

Finally, Defendants argue that the Master Settlement Agreement ("MSA") which they entered into with the States enjoins Defendants from engaging in the same unlawful activity which the Government believes will occur in the future. Defendants point to various specific M.S.A. § provisions that they contend will make equitable relief in this action unnecessary and unwarranted. Accordingly, they argue that their "business" (manufacturing, selling and marketing tobacco products) will not present "opportunities to violate the law in the future," Defs.' Mem. at 66 n.* (citing *First City*, 890 F.2d at 1228).

The Government responds that, applying the three factors announced in *First City*, there is indeed a "reasonable likelihood" that Defendants' past unlawful conduct will continue into the future. Govt's Opp'n at 86. The Government maintains it would be able to prove at trial that the past conduct alleged "would provide strong support for an inference of a risk of future wrongdoing," and that, to the extent that Defendants argue that the Government is required to make such a showing now, at the motion to dismiss stage, rather than at trial, they are simply mistaken. Govt's Opp'n at 87. The Government also denies that it is required to plead the likelihood of Defendants' future acts of fraud with particularity under Fed. R. Civ. P. 9(b). It argues that the core purpose of 9(b) is to protect defendants from reputational harm and "strike" suits, and to provide them with "sufficient information to respond to plaintiff's claims." *Firestone v. Firestone*, 76 F.3d 1205, 1211 (D.C. Cir. 1996). Finally, the Government contends that Defendants' reading of Rule 9(b) would "demand access to a crystal ball," Govt's Opp'n at 90, because it would force plaintiffs to describe the detailed contours of acts which have not yet occurred.

To obtain injunctive relief in this Circuit, a plaintiff must show that the defendant's past unlawful conduct indicates a "'reasonable likelihood of further violation(s) in the future.'" *SEC v. Kenton Capital, Ltd.*, 69 F. Supp. 2d 1, 15 (D.D.C. 1998) (Kollar-Kotelly, J.) (quoting *SEC v. Savoy Ind., Inc.*, 587 F.2d 1149, 1168 (D.C. Cir. 1978)); *SEC v. Bilzerian*, 29 F.3d 689, 695 (D.C. Cir. 1994).

To determine whether there is a "reasonable likelihood" of future violations, the following factors must be considered: "[1] whether a defendant's violation was

isolated or part of a pattern, [2] whether the violation was flagrant and deliberate or merely technical in nature, and [3] whether the defendant's business will present opportunities to violate the law in the future." *First City*, 890 F.2d at 1228 (citing *Savoy Indus.*, 587 F.2d at 1168); *Bilzerian*, 29 F.3d at 695. None of these three factors is determinative; rather, "the district court should determine the propensity for future violations based on the totality of circumstances." *First City*, 890 F.2d at 1228 (citing *SEC v. Youmans*, 729 F.2d 413, 415 (6th Cir. 1984)).

The Government has clearly and overwhelmingly satisfied each of the three *First City* factors. First, Defendants cannot possibly claim that their alleged conspiratorial actions were "isolated." On the contrary, the Complaint describes more than 100 predicate acts spanning more than a half-century. Second, Defendants cannot contend that the alleged RICO violations are "technical in nature." The Government alleges that Defendants' numerous misstatements and acts of concealment were made intentionally and deliberately, rather than accidentally or negligently, as part of a far-ranging, multi-faceted, sophisticated conspiracy. Third, Defendants' business of manufacturing, selling and marketing tobacco products clearly "present[s] opportunities to violate the law in the future." *First City*, 890 F.2d at 1228. As the Government points out, as long as Defendants are in the business of selling and marketing tobacco products, they will have countless "opportunities" and temptations to take unlawful actions, just as it is alleged they have done since 1953. Govt's Opp'n at 87.

Defendants' contention that the M.S.A. § precludes such opportunities is not persuasive. *See* Defs.' Mem. at

70-77. In arguing that the M.S.A. § obviates the need for injunctive relief, Defendants implicitly ask the Court to make the following two assumptions: that Defendants have complied with and will continue to comply with the terms of the MSA, and that the M.S.A. § has adequate enforcement mechanisms in the event of non-compliance. Even assuming the Court could take judicial notice of the MSA, that document's existence certainly does not mean that the Court can or should assume that the M.S.A. § will be fully enforced or otherwise accomplish its intended objectives.

Further, the decisions Defendants cite for the proposition that past allegations of wrongdoing alone cannot warrant injunctive relief are inapposite, because those cases all discuss the standard for *proving* a reasonable likelihood of future violations, not for *pleading* it at the motion to dismiss stage. *See, e.g., SEC v. Commonwealth Chem. Secs*, 574 F.2d 90, 100 (2d Cir. 1978); *SEC v. Blatt*, 583 F.2d 1325, 1334 (5th Cir. 1978).

Indeed, the sole decision cited by Defendants which does address the injunctive relief standard appropriate for a motion to dismiss, *SEC v. Cassano*, 61 F. Supp. 2d 31 (S.D.N.Y. 1999), clarifies the distinction between those two very different legal standards. In *Cassano*, the court recognized that it was "obliged to accept the truth" of the Government's allegation that defendants are "likely to violate securities laws in the future," "for purposes of this motion to dismiss, and so this aspect of the defendants' motion must be denied. Whether the [Government] can prove the allegation remains to be seen." *Id.* at 34. The same can be said of the instant case.

Finally, Defendants' contention that the Government "must allege "a 'reasonable likelihood' of future viola-

tions—future frauds—with the specificity required by Rule 9(b)," Defs.' Mem. at 67, simply defies common sense. It is difficult to see how a plaintiff could ever allege with "particularity" an offense which has not yet happened. Defendants are able to cite only two decisions, both of which are from other circuits, in support of this contention: *Menasco, Inc. v. Wasserman*, 886 F.2d 681 (4th Cir. 1989) and *Continental Realty Corp. v. J.C. Penney Co.*, 729 F. Supp. 1452 (S.D.N.Y. 1990).

In *Menasco*, the defendant's actions "involved a limited purpose," "one perpetrator," "one set of victims," and the racketeering transaction "took place over approximately one year." 886 F.2d at 684. The court specifically held that defendant's acts, as alleged, did not "suggest a 'distinct threat of long-term racketeering activity, either implicit or explicit.'" *Id.* (quoting *H.J. Inc.*, 492 U.S. at 242, 109 S. Ct. 2893). It was on this basis, and these facts, that the court determined that plaintiff's allegations of on-going fraud missed the Rule 9(b) mark. In *Continental Realty*, the court observed that plaintiff's attempt to "infer a threat of repeated fraud from a single alleged scheme would in effect render [RICO's] pattern requirement meaningless." 729 F. Supp. at 1455. Therefore, the court declared that plaintiff's allegations did not pass Rule 9(b) muster.

In neither decision—nor any other decision cited by Defendants, for that matter—did the plaintiff allege as many predicate acts (116), as long a duration of racketeering activity (45 years), as many significant participants (11 entities, which together control virtually the entire tobacco products market), as many victims (hundreds of millions of individuals, scores of government entities, the federal government) or as much money

derived from the racketeering acts (hundreds of billions of dollars).

Based on the sweeping nature of the Government's allegations, and the fact that the parties have barely begun discovery to test the validity of these allegations, it would be premature for the Court to rule on the propriety of injunctive relief in this case. At a very minimum, the Government has stated a claim for injunctive relief; whether the Government can prove it, "remains to be seen."

2. The Specific Equitable Relief of Disgorgement

Defendants contend that even if the Government has alleged the likelihood of future illegal activity, it is still not entitled to the remedy of disgorgement,[27] because that particular remedy is never available under a civil RICO count. Defendants contend that civil RICO remedies must be forward-looking, while disgorgement is, by its very nature, backward-looking. *See* Defs.' Mem. at 80. They argue that the Government is impermissibly attempting to convert its civil RICO count into a criminal one by asking for disgorgement, which is akin to criminal forfeiture of the proceeds of unlawful activity (and permitted only under criminal, not civil, RICO suits). Defendants contend that RICO is to be "read *in pari materia* with the Clayton Act, from which it is in large part derived," Defs.' Mem. at 80, and that disgorgement is not permitted under that act. Finally, Defendants argue that disgorgement in this case would be "impermissibly punitive" and would constitute a double recovery, since the Government already seeks

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[27] The Government seeks to disgorge all the profits that Defendants derived from past unlawful conduct related to the alleged RICO enterprise, beginning in 1953 and continuing to the present.

billions of dollars in damages under the Complaint's MCRA and MSP counts. Defs.' Mem. at 82.

The Government argues that disgorgement is an available and appropriate remedy for civil violations of RICO, and that Defendants' claims to the contrary are, in addition to being legally incorrect, premature at this stage. The Government argues that RICO's plain language does not foreclose disgorgement, and that the Supreme Court has held disgorgement generally available unless a particular statute, "by a necessary and inescapable inference, restricts the court's jurisdiction in equity." *Porter v. Warner Holding Co.*, 328 U.S. 395, 398-99, 66 S. Ct. 1086, 90 L. Ed. 1332 (1946). The Government rejects Defendants' argument that disgorgement is backward-looking and punitive, arguing that it is in fact remedial and may properly serve as a deterrent to Defendants and others who may contemplate committing similar offenses. In addition, the Government contends that disgorgement in this case would in fact serve a forward-looking purpose, namely, to prevent Defendants from using proceeds from prior illegal activities as "capital available for the purpose of funding or promoting [future] illegal conduct." Govt's Opp'n at 98 n.70 (quoting *United States v. Private Sanitation Indus. Ass'n*, 914 F. Supp. 895, 901 (S.D.N.Y. 1996)).

The only court of appeals to consider the question of whether disgorgement is an appropriate civil RICO remedy, the Second Circuit, has answered in the affirmative. *See United States v. Carson*, 52 F.3d 1173 (2d Cir. 1995). The Second Circuit concluded, based on § 1964's plain language[28] and its legislative history, that disgorgement is permitted in civil RICO suits. The

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[28] *See supra* note 24 for the relevant text of § 1964.

court stated that "the legislative history of § 1964 indicates that the equitable relief available under RICO is intended to be 'broad enough to do all that is necessary.'" *Id.* at 1181-82 (quoting S. Rep. No. 617, 91st Cong., 1st Sess. at 79 (1969)).

Even before the Second Circuit's decision in *Carson*, district courts within the Second Circuit had reached the same conclusion. *See United States v. Bonanno Organized Crime Family of La Cosa Nostra*, 683 F. Supp. 1411, 1442-49 (E.D.N.Y. 1988), *aff'd on other grounds*, 879 F.2d 20 (2d Cir. 1989); *United States v. Private Sanitation Indus. Ass'n*, 793 F. Supp. 1114, 1151-52 (E.D.N.Y. 1992); *United States v. Int'l Bhd. of Teamsters*, 708 F. Supp. 1388, 1408 (S.D.N.Y. 1989). Given that the only circuit to have addressed the issue has declared, in a well-reasoned and persuasive opinion, that disgorgement is permissible in civil RICO claims, and given that Defendants cannot point to a single federal court that has declared otherwise, this Court is not inclined to categorically rule out that remedy at the motion to dismiss stage.

Defendants argue that because RICO was modeled after the Clayton Act, 15 U.S.C. § 26, and because a judge of this District Court has declared disgorgement to be unavailable under the Clayton Act, *FTC v. Mylan Labs., Inc.*, 62 F. Supp. 2d 25, 40-42 (D.D.C. 1999) (Hogan, J.), disgorgement should likewise be unavailable under civil RICO. Defendants do not explain, however, why this Court should rely on non-binding federal district court case law under a different statute, when there is persuasive case law—albeit from another circuit—on the precise statute at issue.

Further, the Supreme Court has not, as Defendants contend, declared that the Clayton Act and RICO

should be read "*in pari materia.*"[29] Defs.' Mem. at 80. Rather, the Supreme Court has held that while the "Clayton Act analogy is *generally* useful in civil RICO cases," particular case law interpreting the Clayton Act "may not apply without modification in every civil RICO case." *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 180, 117 S. Ct. 1984, 138 L. Ed. 2d 373 (1997) (emphasis added). Equally important is the fact that Judge Hogan's primary concern in *Mylan Labs*—the possibility of "duplicative recoveries"—is not applicable in this case, since the Court is granting Defendants' motion to dismiss the non-RICO claims. Accordingly, the Government is provided with only one "route to defendants' allegedly ill-gotten gains," namely, its civil RICO suit. 62 F. Supp. 2d at 41.

The Court of Appeals in *Carson* observed that whether disgorgement is appropriate in a particular case depends on whether there is a "*finding* that the gains are being used to fund or promote the illegal conduct, or constitute capital available for that purpose." 52 F.3d at 1182 (emphasis added). This Court has not made such a finding, nor could it at this stage. So long as disgorgement is permitted in civil RICO suits as a matter of law, as the Court so concludes, it would not be appropriate to ask, at the present stage, whether the Government has proved that it has an

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[29] In fact, this Latin phrase, which roughly translated means "on the same matter," and which would suggest that the Clayton Act and RICO should be read in a way to avoid inconsistencies in their respective interpretations, is not even used in either *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 117 S. Ct. 1984, 138 L. Ed. 2d 373 (1997), or *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 112 S. Ct. 1311, 117 L. Ed. 2d 532 (1992), the two Supreme Court decisions Defendants cite.

adequate basis for seeking such a remedy. Accordingly, the Court will permit the Government to pursue the remedy of disgorgement and the motion to dismiss as to this claim must be denied.

V. *Liggett's Motion To Dismiss RICO Counts*

Although Liggett joins the other Defendants' "broad arguments of general applicability to the Complaint," Memorandum of Liggett in Support of Motion to Dismiss the Complaint ("Liggett Mem.") at 1, it has filed its own motion to dismiss the Complaint's RICO counts, advancing some additional grounds in support thereof.

A. The RICO Elements

Liggett argues that the Government has not sufficiently alleged, as to it, two of the four elements required for a RICO claim: "enterprise" and "pattern of racketeering activity".[30]

1. RICO's "Enterprise" Element

As defined earlier, an "enterprise," as that term is used in a RICO claim, is "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." *Turkette*, 452 U.S. at 580, 101 S. Ct. 2524. It need not have a formal hierarchy or framework, "so long as it involves some structure, to distinguish an enterprise from a mere conspiracy." *United States v. Richardson*, 167 F.3d 621, 625 (D.C. Cir. 1999) (internal citations and quotations omitted). The three elements necessary to establish an enterprise are: "(1) a common purpose among the participants, (2) organization, and (3) continuity." *United States v. Perholtz*, 842 F.2d 343, 362 (D.C. Cir. 1988).

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[30] *See supra* Section IV.C, at 33-35.

Liggett argues that the Government has not adequately alleged the existence of an enterprise. Specifically, Liggett contends that the Government has failed to show that the putative enterprise had the requisite "organization." According to Liggett, the Complaint makes only conclusory allegations, without describing how the enterprise operated, who its leaders were, or how its decision-making process functioned. *See* Liggett Mem. at 25-26.

The Court concludes that the Complaint properly alleges the existence of an enterprise, and Liggett's involvement therein. "It is clear an enterprise can be established through an informal group of people who come together for the common purpose of obtaining financial gain through criminal activity." *United States v. Cooper*, 91 F. Supp .2d 60, 68 (D.D.C. 2000) (Joyce Green, J.) (citations omitted). The enterprise can be as simple as an "amoeba-like infra-structure that controls a secret criminal network." *United States v. Elliott*, 571 F.2d 880, 898 (5th Cir. 1978).

Liggett's argument that the Government must spell out the mechanics or logistics of the enterprise is unsupported by the case law. Numerous courts, in this Circuit and others, have established that the kind of allegations contained in the Government's Complaint are easily sufficient to survive a Rule 12(b)(6) motion. For example, in *Perholtz*, the complaint stated: "Defendant . . . constituted an enterprise . . . to wit, a group of individual, partnerships, and corporations associated in fact to unjustly enrich themselves from the proceeds of government contracts . . ." 842 F.2d at 351, n.12. And in *Private Sanitation Ind. Ass'n*, 793 F. Supp. 1114, the complaint stated that the enterprise was "a group composed of, but not limited to" 112

defendants "associated-in-fact for the purpose of controlling the waste disposal industry in Long Island." *Id.* at 1126. In both cases, the allegations were deemed sufficient to survive a motion to dismiss. In the instant case, the Complaint alleges that Defendants decided on a joint objective to "preserve and expand the market for cigarettes and to maximize" their profits and "agreed that the strategy they were implementing was a 'long-term one' that required defendants to act in concert with each other on the current health controversy, as well as on issues that would face them in the future." Compl. at ¶¶ 33-34. The nature of these allegations is at least as detailed as those made in *Perholtz* and *Private Sanitation*, if not more so. Accordingly, the Government has adequately pleaded the enterprise element.

2. RICO's "Pattern Of Racketeering Activity" Element

A "pattern of racketeering activity" is defined as "at least two acts of racketeering activity" committed within a ten year period. In this case, as already noted, the Government relies on violations of 18 U.S.C. §§ 1341 (mail fraud) and 1343 (wire fraud) as the "predicate acts" which transform Defendants' alleged misconduct into "racketeering activity." 18 U.S.C. § 1961(5). The mail fraud statute[31] provides that "[w]hoever, having devised or intending to devise any scheme or artifice to

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[31] The mail fraud and wire fraud statutes are construed identically. *See, e.g., United States v. Lemire*, 720 F.2d 1327, 1335 n. 6 (D.C. Cir. 1983) (citations omitted). At any rate, since thirteen of the fourteen acts of racketeering alleged against Liggett are mail fraud, and since a "pattern of racketeering activity" requires two or more acts, it is the mail fraud, not the wire fraud, analysis which is dispositive in this case.

defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises . . . for the purpose of executing such scheme or artifice or attempting so to do," mails or causes the mailing of any matter, is guilty of mail fraud. 18 U.S.C. § 1341.

Liggett argues that the Complaint does not allege convergence between the party deceived (individual smokers) and the party whose property was injured (the Government); according to Liggett, it was the Government that suffered economic injury, not individual smokers. Liggett Mem. at 29-30. Liggett's convergence argument misstates the relevant case law. A defendant who uses the mail with the *intent* of defrauding someone of property is guilty (or in this case, liable), whether the attempt succeeds or not. *See, e.g., Carpenter v. United States*, 484 U.S. 19, 26-27, 108 S. Ct. 316, 98 L. Ed. 2d 275 (1987); *United States v. Pollack*, 534 F.2d 964, 971 (D.C. Cir. 1976). According to the Complaint's allegations, Defendants did *intend* to defraud individual smokers of their property (*i.e.*, the money they spent on cigarettes).[32] Moreover, the Complaint also alleges—though it need not—that Defendants *succeeded* in defrauding individual smokers. *See* Compl. at ¶ ¶ 204(b)—(d).

Liggett also argues that the Complaint fails to meet the pleading standard of Federal Rule of Civil Procedure 9(b), which requires that "the circumstances constituting fraud . . . shall be stated with particularity."

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[32] The Complaint states: "Defendants and others known and unknown did knowingly and intentionally devise and intend to devise a scheme and artifice to defraud, and obtain money and property from, members of the public." Compl. at ¶ 204(a).

To satisfy this standard, a complaint must specify "the time, place and content of the false misrepresentations, the fact misrepresented and what was retained or given up as a consequence of the fraud." *Firestone*, 76 F.3d at 1211 (internal quotations and citation omitted).

The Appendix to the Complaint does describe the time, place, and content of each allegedly fraudulent act, states the fact(s) misrepresented, and names the particular Defendants involved. *See* Appendix at ¶¶ 13, 17, 22, 28, 31, 44, 66, 67, 70, 73, 77, 88, and 112. Although each allegation does not, in its body, include a statement of "what was retained or given up as a consequence of the fraud," *Firestone*, 76 F.3d at 1211, the Complaint does allege elsewhere that the item "given up" was the money the Government spent on tobacco-related health care. *See* Compl. at ¶ 6. Accordingly, the Complaint alleges the mail fraud acts with sufficient particularity.

B. Liggett's Alleged Withdrawal From the Conspiracy

Liggett also argues that, regardless of whether the Government has generally satisfied the RICO elements, Liggett has "withdrawn" from the enterprise, and accordingly the Complaint fails to adequately allege the "enterprise" element as to Liggett and/or the need for injunctive relief against it.

Liggett contends that the "public record" amply demonstrates that it is no longer acting in concert with the other Defendants, and that there is no reasonable likelihood it will commit unlawful acts in the future to warrant injunctive relief. Even if the Court were precluded from considering these outside sources, Liggett contends that it is "plain from the face of the Complaint

that Liggett poses no risk of committing future acts of racketeering activity" and that the Complaint "does not, and indeed cannot, make any allegation that Liggett poses a risk of any future violations of RICO." Liggett Mem. at 19.

The Government responds that this Court is "limited to consideration of the facts alleged in the four corners of the complaint," which do not indicate that Liggett has withdrawn. Opp'n to Liggett at 10. The Government also contends that it would be premature, at this early stage, for the Court to determine whether Liggett threatens to commit future illegal acts or not.

Although courts may take the "public record" into account when deciding motions to dismiss,[33] that record includes only certain official documents, not mere newspaper articles.[34] Liggett's evidentiary support for its claim to have withdrawn from the enterprise consists almost exclusively of quotations from newspaper articles or from government reports that are neither part of a public record nor matters for judicial notice.[35]

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[33] *See, e.g., Marshall County Health Care Auth. v. Shalala*, 988 F.2d 1221, 1222, 1226 n.6 (D.C. Cir. 1993); *Phillips v. Bureau of Prisons*, 591 F.2d 966, 969 (D.C. Cir. 1979).

[34] Public records are "[r]ecords, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report . . . or (C) in civil actions and proceedings . . ., factual findings resulting from an investigation made pursuant to authority granted by law." Fed. R. Evid. 803(8).

[35] The Court is aware of only one relevant document cited by Liggett which is possibly part of the public record: a report issued by the Federal Trade Commission entitled "Competition and the Financial Impact of the Proposed Tobacco Settlement" (Sept. 1997). *See* Liggett Mem. at 3. However, Liggett does not quote

See Liggett Mem. at 5-10. Accordingly, the Court may not take these documents into account.

Without reference to the sundry newspaper clippings Liggett cites, its claim to have withdrawn from the enterprise is wholly unpersuasive. To establish that it is no longer a member of the enterprise, Liggett must show that it "withdrew from the conspiracy by an affirmative act designed to defeat the purpose of the conspiracy." *See In Re Corrugated Container Antitrust Litig.*, 662 F.2d 875, 886 (D.C. Cir. 1981). Because withdrawal is an affirmative defense, the affirmative acts listed above must "clearly appear [ ] on the face of the complaint." *Fortner v. Thomas*, 983 F.2d 1024, 1028 (11th Cir. 1993).

The Complaint is devoid of any affirmative acts by Liggett that would indicate its withdrawal from the RICO enterprise. On the contrary, the Complaint expressly states that "[f]rom at least the early 1950's and *continuing up to and including the date of the filing of this complaint* . . . Liggett . . . did unlawfully, knowingly and intentionally" conduct and participate in, and conspire to participate in, the enterprise's affairs. Compl. at ¶¶ 172, 201 (emphasis added).

Despite Liggett's attempt to use the Complaint's language to show that it is now a fully law-abiding corporate citizen, the above quoted language from the Complaint adequately alleges that Liggett is likely to commit certain racketeering acts in the future. In addition, given the complex nature of the Government's allegations, and the fact that numerous allegations simply refer to "Defendants"—without expressly ex-

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from the report or indicate in any way how it would establish Liggett's withdrawal from the enterprise.

cluding Liggett[36]—it would be premature at this time to preclude the Government from pursuing injunctive relief.

Accordingly, Liggett's separate motion to dismiss the Government's RICO Count must be denied.

V. *Conclusion*

For the reasons stated at length above, Certain Defendants' Motion to Dismiss for Failure to State a Claim [# 72] is **granted in part and denied in part.** The motion is granted as to Count 1 (the Medical Care Recovery Act claim), **granted** as to Count 2 (the Medicare Secondary Payer claim), and denied as to Counts 3 and 4 (the Racketeer Influenced and Corrupt Organization Act claims). The Liggett Group Inc.'s Motion to Dismiss for Failure to State a Claim [# 70] is **denied.**

An Order will issue with this Opinion.

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[36] *See, e.g.*, Compl. at ¶ 208 ("After a span of more than forty-five years of deception and fraud, it would be unreasonable to believe that *defendants* will voluntarily cease their unlawful conduct, or that their pattern of racketeering activity will cease without intervention by this Court.") (emphasis added).

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-5267

Consolidated with 06-5268, 06-5269, 06-5270, 06-5271, 06-5272, 06-5332, 06-5367, 07-5102, 07-5103

UNITED STATES OF AMERICA, UNITED STATES DEPARTMENT OF JUSTICE, ET AL., APPELLEES

v.

PHILIP MORRIS USA INC., FORMERLY KNOWN AS PHILIP MORRIS INCORPORATED, ET AL., APPELLEES

BRITISH AMERICAN TOBACCO (INVESTMENTS) LTD., DIRECTLY AND AS SUCCESSOR TO BRITISH-AMERICAN TOBACCO COMPANY LTD., APPELLANT

THE COUNCIL FOR TOBACCO RESEARCH-USA, INC., ET AL., APPELLEES

Filed: Sept. 22, 2009

ORDER

Before: SENTELLE, Chief Judge, and TATEL and BROWN, Circuit Judges

Upon consideration of the petitions of Philip Morris USA Inc., R.J. Reynolds Tobacco Co., Lorillard Tobacco

Co., Altria Group Inc., and British America Tobacco (Investments) Ltd. for panel rehearing, it is

ORDERED that the petitions be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

By: /s/ _____
Michael C. McGrail
Deputy Clerk

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-5267

Consolidated with 06-5268, 06-5269, 06-5270, 06-5271, 06-5272, 06-5332, 06-5367, 07-5102, 07-5103

UNITED STATES OF AMERICA, UNITED STATES DEPARTMENT OF JUSTICE, ET AL., APPELLEES

v.

PHILIP MORRIS USA INC., FORMERLY KNOWN AS PHILIP MORRIS INCORPORATED, ET AL., APPELLEES

BRITISH AMERICAN TOBACCO (INVESTMENTS) LTD., DIRECTLY AND AS SUCCESSOR TO BRITISH-AMERICAN TOBACCO COMPANY LTD., APPELLANT

THE COUNCIL FOR TOBACCO RESEARCH-USA, INC., ET AL., APPELLEES

Filed: Sept. 22, 2009

ORDER

Before: SENTELLE, Chief Judge, and GINSBURG,* HENDERSON,* ROGERS, TATEL, GARLAND,* BROWN, GRIFFITH, and KAVANAUGH,* Circuit Judges

Upon consideration of the petitions of Philip Morris USA Inc., R.J. Reynolds Tobacco Co., Lorillard Tobacco Co., Altria Group Inc., and British America Tobacco (Investments) Ltd. for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petitions be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

By: /s/ _____
Michael C. McGrail
Deputy Clerk

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* Circuit Judges Ginsburg, Henderson, Garland and Kavanaugh did not participate in this matter.

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 04-5252

UNITED STATES OF AMERICA, APPELLEE

v.

PHILIP MORRIS USA INC., ET AL., F/K/A/
PHILIP MORRIS INCORPORATED, APPELLANTS

PHARMACIA CORPORATION AND PFIZER INC.,
APPELLEES

Filed: Apr. 19, 2005

ORDER

Before: SENTELLE AND TATEL,* Circuit Judges, and WILLIAMS, Senior Circuit Judge

Upon consideration of the petition of the United States of America for rehearing filed March 4, 2005, and the response thereto, it is

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* Circuit Judge Tatel would grant the petition for rehearing.

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

By:

/s/ _____
Nancy G. Dunn
Deputy Clerk

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 04-5252

UNITED STATES OF AMERICA, APPELLEE

v.

PHILIP MORRIS USA INC., ET AL., F/K/A/
PHILIP MORRIS INCORPORATED, APPELLANTS

PHARMACIA CORPORATION AND PFIZER INC.,
APPELLEES

Filed: Apr. 19, 2005

ORDER

Before: GINSBURG, Chief Judge, and EDWARDS,** SENTELLE, HENDERSON,* RANDOLPH, ROGERS,** TATEL,** GARLAND,* AND ROBERTS,* Circuit Judges

The petition of the United States of America for rehearing en banc and the response thereto have been circulated to the full court. The taking of a vote was requested. Thereafter, a majority of the judges of the

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* Circuit Judges Henderson, Garland, and Roberts did not participate in this matter.

** Circuit Judges Edwards, Rogers, and Tatel would grant the petition for rehearing en banc.

court in regular, active service did not vote in favor of the petition. Upon consideration of the foregoing, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

By:

/s/ _____
Nancy G. Dunn
Deputy Clerk

APPENDIX I

The Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1961 *et seq.*, provides in pertinent part:

§ 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which

is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

§ 1963. Criminal penalties

(a) Whoever violates any provision of section 1962 of this chapter shall be fined under this title or imprisoned not more than 20 years (or for life if the violation is based on a racketeering activity for which the maximum penalty includes life imprisonment), or both, and shall forfeit to the United States, irrespective of any provision of State law—

(1) any interest the person has acquired or maintained in violation of section 1962;

(2) any—

(A) interest in;

(B) security of;

(C) claim against; or

(D) property or contractual right of any kind affording a source of influence over;

any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962; and

(3) any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962.

The court, in imposing sentence on such person shall order, in addition to any other sentence imposed pursuant to this section, that the person forfeit to the United States all property described in this subsection. In lieu of a fine otherwise authorized by this section, a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.

* * * * *

§ 1964. Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

Supreme Court, U.S.
FILED

09-978 FEB 19 2010

OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

PHILIP MORRIS USA, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI (VOLUME 2)

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TABLE OF CONTENTS

Page

Volume 1

Appendix A — Court of appeals opinion (May 22, 2009) 1a

Appendix B — Court of appeals opinion (Feb. 4, 2005) 99a

Appendix C — District court memorandum opinion (May 21, 2004) 177a

Appendix D — Court of appeals memorandum opinion (Sept. 28, 2000) 196a

Appendix E — Court of appeals order (Sept. 22, 2009) 246a

Appendix F — Court of appeals order (Sept. 22, 2009) 248a

Appendix G — Court of appeals order (Apr. 19, 2005) 250a

Appendix H — Court of appeals order (Apr. 19, 2005) 252a

Appendix I — Statutory provisions 254a

Volume 2

Appendix J — Excerpt of district court final opinion (Aug. 17, 2006) 258a

APPENDIX J

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No. CIV.A. 99-2496(GK)

UNITED STATES OF AMERICA, PLAINTIFF
AND
TOBACCO-FREE KIDS ACTION FUND, AMERICAN CANCER SOCIETY, AMERICAN HEART ASSOCIATION, AMERICAN LUNG ASSOCIATION, AMERICANS FOR NONSMOKERS' RIGHTS, AND NATIONAL AFRICAN AMERICAN TOBACCO PREVENTION NETWORK, INTERVENORS,

v.

PHILIP MORRIS USA, INC., (F/K/A PHILIP MORRIS, INC.), ET AL., DEFENDANTS

Aug. 17, 2006

FINAL OPINION

KESSLER, District Judge.

TABLE OF CONTENTS

I. INTRODUCTION 26

A. Overview 26

B. Preliminary Guidance for the Reader 29

II. PROCEDURAL HISTORY 31

III. CREATION, NATURE, AND OPERATION OF THE ENTERPRISE 34

A. Pre-1953 Overview—The Rise in American Smoking and the Status of Scientific Research on Smoking and Health 35

B. Creation of the Enterprise 36

C. TIRC/CTR—Tobacco Industry Research Committee/Council for Tobacco Research–USA 41

1. Selection and Approval of TIRC's Scientific Advisory Board Members and Scientific Director 46
2. Research Activities of TIRC/CTR 49
3. Public Relations Activities of TIRC/CTR 53
4. Publications and Public Statements of TIRC/CTR 56
   a. TIRC/CTR Annual Reports 56
   b. TIRC/CTR Newsletters 58
   c. TIRC/CTR Press Releases and Other Public Statements 60

D. Tobacco Institute 62

1. Formation of the Tobacco Institute ... 62

2. Relationship Between the Tobacco Institute and TIRC/CTR 66
3. Tobacco Institute Press Releases, Public Statements, Advertisements, Brochures, and Other Publications ... 70
4. Tobacco Institute Committees 77
a. Committee of Counsel and Outside Counsel 77
b. Tobacco Institute Executive Committee 80
c. Tobacco Institute Communications Committee 81
5. Tobacco Institute College of Tobacco Knowledge 82
6. Tobacco Institute Testing Laboratory 86

E. Joint Research Activity Directed by Defendants' Executives and Lawyers 87

1. Witness Development 87
2. CTR Special Projects 91
a. Nature of CTR Special Projects 91
b. Lawyers' Involvement with CTR Special Projects 94
c. Scientists Funded Through CTR Special Projects 100
3. Lawyers' Special Accounts 100
a. Special Account No. 3 101
b. Special Account No. 4 101
c. Special Account No. 5 106
d. Institutional Grants 107

F. Committees 108

1. Research Review Committee, Research Liaison Committee, and Industry Research Committee 108
2. Industry Technical Committee 110
3. Tobacco Working Group 112

G. Coordinated Smoking and Health Literature Collection and Retrieval 115

H. Defendants' Organizations Focused on ETS Issues 118

I. International Organizations, Committees, and Groups 119

1. Overview 119
2. TMSC—Tobacco Manufacturers' Standing Committee 123
3. TRC—Tobacco Research Council 125
4. TAC—Tobacco Advisory Council 126
5. ICOSI—International Committee on Smoking Issues 129
6. INFOTAB—International Tobacco Information Center 132
7. TDC—Tobacco Documentation Centre 135
8. CORESTA—Center for Cooperation in Scientific Research Relative to Tobacco/Centre de Coopération pour les Recherches Scientifques Relatives au Tabac 136
9. Tobacco Institute Interaction with Overseas and International Groups .. 137

J. Dissolution of CTR and the Tobacco Institute 141

1. CTR 142

2. Tobacco Institute 143

IV. THE DEFENDANTS ARE ENGAGED IN AND THEIR ACTIVITIES AFFECT INTERSTATE AND FOREIGN COMMERCE 143

A. Philip Morris Companies 143
B. Philip Morris 143
C. R.J. Reynolds 144
D. Liggett 144
E. Lorillard 144
F. BATCo 144
G. Brown & Williamson 144
H. American 144
I. Tobacco Institute 144
J. TIRC/CTR 145

V. DEFENDANTS DEVISED AND EXECUTED A SCHEME TO DEFRAUD CONSUMERS AND POTENTIAL CONSUMERS OF CIGARETTES IN MOST, BUT NOT ALL, OF THE AREAS ALLEGED BY THE GOVERNMENT 146

A. Defendants Have Falsely Denied, Distorted and Minimized the Significant Adverse Health Consequences of Smoking for Decades 146

1. Cigarette Smoking Causes Disease .. 146
2. Scientific Research on Lung Cancer up to December 1953 148
a. Scientists Investigating the Rise in the Incidence of Lung Cancer Linked Smoking and Disease before 1953 148

b. By 1953, Defendants Recognized the Need for Concerted Action to Confront Accumulating Evidence of the Serious Consequences of Smoking 153
3. Developments Between 1953 and 1964 155
a. Between 1953 and 1964, the Evidence Demonstrating that Smoking Causes Significant Adverse Health Effects Grew Although No Consensus Had Yet Been Reached 155
b. Before 1964, Defendants Internally Recognized the Growing Evidence Demonstrating that Smoking Causes Significant Adverse Health Effects 164
c. In the 1950s, Defendants Began Their Joint Campaign to Falsely Deny and Distort the Existence of a Link Between Cigarette Smoking and Disease, Even Though Their Internal Documents Recognized Its Existence 168
4. The 1964 Surgeon General Report Represented a Scientific Consensus that Smoking Causes Disease 174
a. The Process and Methodology of the Surgeon General's Report .. 174
b. The Conclusions 178
5. Post–1964 Research on the Adverse Health Effects of Smoking and Defendants' Persistent Denials Thereof 179

a. Following Publication of the 1964 Report, the Scientific Community Continued to Document the Link Between Smoking and an Extraordinary Number of Serious Health Consequences 179
b. Defendants' Internal Documents and Research from the 1960s, 1970s, and Beyond Reveal Their Continued Recognition that Smoking Causes Serious Adverse Health Effects and Their Fear of the Impact of Such Knowledge on Litigation 180
c. Despite Their Internal Knowledge, Defendants Continued, From 1964 Onward, to Falsely Deny and Distort the Serious Health Effects of Smoking 187
6. As of 2005, Defendants Still Do Not Admit the Serious Health Effects of Smoking Which They Recognized Internally Decades Ago 204
7. Conclusions 207
B. The Addictive Properties of Nicotine ... 208
1. Introduction 208
2 Cigarette Smoking Is Addictive and Nicotine Is the Primary Element of that Addiction 209
a. How Nicotine Operates within the Body 209
b. Evolving Definitions of "Addiction" and Classification of Nicotine 211

c. Consequences of the Addictiveness of Nicotine 216
d. Conclusion 218
3. Defendants Were Well Aware that Smoking and Nicotine Are Addictive 218
a. Philip Morris 219
b. R.J. Reynolds 231
c. BATCo 237
d. Brown & Williamson 258
e. Lorillard 266
f. American Tobacco Company 269
g. CTR 270
4. Defendants Publicly Denied that Nicotine Is Addictive and Continue to Do So 271
a. Philip Morris 272
b. R.J. Reynolds 274
c. BATCo 277
d. American Tobacco Company 278
e. Brown & Williamson 278
f. Lorillard 279
g. Liggett 280
h. Tobacco Institute 281
i. CTR 286
j. Defendants' Conduct Continues ... 286
5. Defendants Concealed and Suppressed Research Data and Other Evidence that Nicotine Is Addictive . 289
a. Philip Morris 290
b. BATCo 297
c. Brown & Williamson 298
d. American Tobacco Company 303
e. Tobacco Institute 303

f. CTR and Other Defendant Funded Research Groups 303
6. Conclusions 307

C. Nicotine "Manipulation": Defendants Have Falsely Denied that They Can and Do Control the Level of Nicotine Delivered In Order to Create and Sustain Addiction 308

1. For Decades, Defendants Have Recognized that Controlling Nicotine Delivery, in Order to Create and Sustain Smokers' Addiction, Was Necessary to Ensure Commercial Success 309
a. Defendants Recognized the Need to Determine "Minimum" and "Optimum" Nicotine Delivery Levels in Order to Provide Sufficient "Impact" and "Satisfaction" to Cigarette Smokers 309
(1) Philip Morris 311
(2) R.J. Reynolds 312
(3) Brown & Williamson and BATCo 314
(4) Lorillard 315
(5) Liggett 315
b. Defendants Have Long Recognized that Controlling the Nicotine to Tar Ratio Would Enable Them to Meet Minimum and Optimum Nicotine Delivery Levels 315
(1) Philip Morris 315
(2) R.J. Reynolds 319

(3) Brown & Williamson and BATCo 325
(4) American 328
(5) Lorillard 329
(6) Liggett 333
c. Defendants Understood the Correlation Between Nicotine Delivery and Cigarette Sales 334
(1) Philip Morris 334
(2) R.J. Reynolds 334
(3) Brown & Williamson and BATCo 335
(4) Lorillard 336
2. Defendants Researched, Developed, and Utilized Various Designs and Methods of Nicotine Control to Ensure that All Cigarettes Delivered Doses of Nicotine Adequate to Create and Sustain Addiction 337
a. Defendants Recognized the Need to Design Cigarettes that Would Produce Low Nicotine and Tar Measurements under the FTC Method While Also Delivering the Minimum Nicotine Levels to Create and Sustain Addiction 338
b. Leaf Blend and Filler: Defendants Controlled the Amount and Form of Nicotine Delivery in Their Commercial Products by Controlling the Physical and Chemical Make-Up of the Tobacco Blend and Filler 339
(1) Philip Morris 341

(2) R.J. Reynolds 343
(3) Brown & Williamson and BATCo 344
(4) American 345
(5) Lorillard 347
(6) Liggett 348
c. Nicotine to Tar Ratio: Defendants Have Used Physical Design Parameters to Increase the Nicotine to Tar Ratio of Their Cigarettes 349
(1) Filter Design 350
(2) Ventilation and Air Dilution .. 351
(3) Paper Porosity and Composition 351
d. Smoke pH and Ammonia: Defendants Altered the Chemical Form of Nicotine Delivered in Mainstream Cigarette Smoke for the Purpose of Improving Nicotine Transfer Efficiency and Increasing the Speed with Which Nicotine Is Absorbed by Smokers 352
(1) Scientific Overview 352
(2) Individual Defendants' Documents 357
(a) Philip Morris 357
(b) R.J. Reynolds 360
(c) Brown & Williamson and BATCo 364
(d) American 369
(e) Lorillard 370
(f) Liggett 371
e. Other Additives: Defendants Researched the Use of Other Addi-

tives to Control Nicotine Delivery . 372
3. Defendants Have Made False and Misleading Public Statements Regarding Their Control of the Nicotine Content and Delivery of Their Products 374
a. The Waxman Hearings 374
b. Defendants' False and Misleading Public Statements Continued After the Waxman Hearings 380
c. Testimony Consistent with Fraudulent Public Statements 383
4. Conclusions 383

D. The Government Has Failed to Prove by a Preponderance of the Evidence that Defendants Deliberately Chose Not to Utilize or Market Feasible Designs or Product Features that Could Produce Less Hazardous Cigarettes 384

1. Introduction 384
2. Defendants Have Long Acknowledged Internally the Existence of a Market for a Genuinely Less Hazardous Cigarette 385
3. Defendants Received Conflicting Messages From the Government and the Public Health Community About Their Efforts to Create and Market Less Hazardous Cigarettes .. 386
4. As Part of the Effort to Make Less Hazardous Cigarettes, Defendants Experimented with General and Selective Reduction 389

a. General Reduction 389
b. Selective Reduction 391
(1) Defendants' Efforts to Reduce Benzo(a)pyrene 392
(2) Defendants' Efforts to Reduce Phenols Through Use of Charcoal Filtered Cigarettes 392
(a) Philip Morris 393
(b) RJ Reynolds 395
(c) Lorillard's York Cigarette 395
(3) Defendants' Efforts to Reduce Ciliastats 396
(4) Defendants' Efforts to Reduce Delivery of Tobacco-Specific Nitrosamines 396
5. Defendants' Efforts to Develop/ Market Potentially Less Hazardous Non-Conventional Products 399
a. Philip Morris 399
(1) Accord 399
(2) Next 400
(3) Nicotine Analogue Program .. 401
b. RJ Reynolds 402
(1) The Multijet Filter 402
(2) Heated Tobacco Products 403
(a) Premier 403
(b) Eclipse 410
(3) EW/Winston Select 415
c. BATCo and Brown & Williamson .. 420
(1) FACT Cigarette 420
(2) Project Ariel 421
(3) Project Airbus 422
(4) Advance 423

d. Lorillard's Zero Tar and PMO Projects 426
e. Liggett's Project XA 426
6. The Government Has Not Proven by a Preponderance of the Evidence that Defendant Had a "Gentleman's Agreement" Not to Develop a Less Hazardous Cigarette and Not to Do In-House Bioogical Research on the Hazards of Smoking 427
7. Conclusions 429

E. Defendants Falsely Marketed and Promoted Low Tar/Light Cigarettes as Less Harmful than Full-Flavor Cigarettes in Order to Keep People Smoking and Sustain Corporate Revenues 430

1. Low Tar/Light Cigarettes Offer No Clear Health Benefit over Regular Cigarettes 431
a. History of Health Claims 431
b. The FTC Method 433
c. The FTC Method Does Not Measure Actual Tar and Nicotine Delivery 435
d. The Public Health Community Has Concluded that Low Tar Cigarettes Offer No Clear Health Benefit 444
2. Based on Their Sophisticated Understanding of Compensation, Defendants Internally Recognized that Low Tar/Light Cigarettes Offer No Clear Health Benefit 456

a. Defendants Internally Recognized that Low Tar Cigarettes Are Not Less Harmful Than Full-Flavor Cigarettes 456
(1) Philip Morris 456
(2) RJ Reynolds 458
(3) Brown & Williamson 459
(4) BATCo 460
(5) Lorillard 460
(6) Liggett 460
b. Internally, Defendants Had an Extensive and Sophisticated Understanding of Smoker Compensation 461
(1) Philip Morris 461
(2) RJ Reynolds 467
(3) Brown & Williamson 469
(4) BATCo 470
(5) American Tobacco 474
(6) Lorillard 474
3. Defendants Internally Recognized that Smokers Switch to Low Tar/ Light Cigarettes, Rather than Quit Smoking, Because They Believe They Are Less Harmful 475
a. Defendants Recognized that Smokers Choose Light/Low Tar Cigarettes for a Perceived Health Benefit 476
(1) Philip Morris 477
(2) R.J. Reynolds 481
(3) Brown & Williamson 483
(4) BATCo 485
(5) American Tobacco 487

(6) Lorillard 487
b. Defendants Internally Recognized that Smokers Rely on the Claims Made for Low Tar/Light Cigarettes as an Excuse/Rationale for Not Quitting Smoking 488
(1) Tobacco Institute 488
(2) Philip Morris 488
(3) R.J. Reynolds 492
(4) Brown & Williamson 495
(5) BATCo 497
(6) American Tobacco 499
(7) Lorillard 499
(8) Liggett 500
4. Despite Their Internal Knowledge, Defendants Publicly Denied that Compensation Is Nearly Complete and that the FTC Method is Flawed . 500
a. Tobacco Institute 504
b. Philip Morris 504
c. RJ Reynolds 506
d. Brown & Williamson 506
e. BATCo 507
f. American Tobacco 507
g. Lorillard 507
5. Despite Their Internal Knowledge, Defendants' Marketing and Public Statements About Low Tar Cigarettes Continue to Suggest that They Are Less Harmful than Full-Flavor Cigarettes 507
a. Philip Morris 513
(1) Philip Morris's Low Tar Cigarette Marketing Techniques .. 513

(2) Philip Morris's Research on the Low Tar Cigarette Category 524
(3) Philip Morris's Public Statements About Low Tar Cigarettes 527
b. R.J. Reynolds 529
(1) R.J. Reynolds's Low Tar Marketing Techniques 529
(2) R.J. Reynolds's Research on the Low Tar Cigarette Category 535
(3) RJR's Public Statements About Low Tar Cigarettes 537
c. Brown & Williamson 537
(1) Brown & Williamson's Marketing of Low Tar Cigarettes . 537
(2) Brown & Williamson's Research on the Low Tar Cigarette Category 540
(3) Brown & Williamson's Public Statements About Low Tar Cigarettes 545
d. BATCo 546
(1) BATCo's Research on the Low Tar Cigarette Category .. 546
(2) BATCo's Public Statements About Low Tar Cigarettes 549
e. American Tobacco Marketing of Low Tar Cigarettes 549
f. Lorillard 554
(1) Lorillard's Marketing of Low Tar Cigarettes 554

(2) Lorillard's Research on the Low Tar Cigarette Category .. 558
g. Liggett 560
6. Conclusions 560

F. From the 1950s to the Present, Different Defendants, at Different Times and Using Different Methods, Have Intentionally Marketed to Young People Under the Age of Twenty-One in Order to Recruit "Replacement Smokers" to Ensure the Economic Future of the Tobacco Industry 561

1. Definition of Youth 561
2. The Defendants Need Youth as Replacement Smokers 561
3. Defendants' Marketing Is a Substantial Contributing Factor to Youth Smoking Initiation 565
a. Development of the Link Between Marketing and Youth Smoking 565
(1) No Single-Source Causative Factor Can Describe the Complex Link Between Marketing and Youth Smoking 565
(2) Public Health Authorities Have Found that Marketing Is a Substantial Contributing Factor to Youth Smoking Initiation 566
(3) Independent Studies Have Found that Marketing Is a Substantial Contributing Factor to Youth Smoking Initiation 569

(4) Credible Expert Witnesses Have Found that Marketing Is a Substantial Contributing Factor to Youth Smoking Initiation 570
b. The Ubiquity of Defendants' Marketing Normalizes and Legitimizes Smoking for Youth 575
c. Risk Perception: The Inability of Youth to Grasp the Full Implications of Smoking 576
4. Tracking Youth Behavior and Preferences Ensures that Marketing and Promotion Reach Youth 580
a. Defendants Track Youth Behavior and Preferences 580
(1) Philip Morris 580
(2) Lorillard 594
(3) American Tobacco, BATCo, and Brown & Williamson 598
(4) R.J. Reynolds 607
b. Defendants' Marketing Employs Themes Which Resonate with Youth 616
(1) Philip Morris 617
(2) Lorillard 622
(3) Brown & Williamson 625
(4) R.J. Reynolds 630
c. Defendants Continue Price Promotions for Premium Brands Which Are Most Popular with Teens 639
(1) Philip Morris 641
(2) Liggett 643
(3) Lorillard 643

(4) Brown & Williamson 643
(5) R.J. Reynolds 644
5. Defendants' Marketing Successfully Reaches Youth 645
a. Defendants' Spending on Marketing and Promotion Has Continually Increased 645
b. Defendants Advertise in Youth-Oriented Publications 646
(1) Philip Morris 647
(2) Liggett 651
(3) Lorillard 651
(4) Brown & Williamson 653
(5) R.J. Reynolds 654
c. Defendants Market to Youth Through Direct Mail 656
(1) Philip Morris 656
(2) Lorillard 658
(3) Brown & Williamson 659
(4) R.J. Reynolds 659
d. Defendants Market to Youth Through an Array of Retail Promotions 659
e. Defendants' Promotional Items, Events and Sponsorships Attract Youth 663
(1) Events 663
(2) Sponsorships 664
(3) Promotional Items 667
6. Defendants' Youth Smoking Prevention Programs Are Not Designed to Effectively Prevent Youth Smoking . 667

7. Despite the Overwhelming Evidence to the Contrary, Defendants' Public Statements and Official or Internal Corporate Policies Deny that Their Marketing Targets Youth or Affects Youth Smoking Incidence 672
a. Defendants Claim They Restrict Their Marketing to People Twenty-one and Older 672
(1) The 1964 Advertising Code ... 672
(2) Official Corporate Policies 674
b. Defendants Deny Their Marketing Influences Youth Smoking Initiation; Defendants' Explanation for Their Marketing Practices Is Not Credible 676
(1) Tobacco Institute 676
(2) Philip Morris 682
(3) Liggett 684
(4) Lorillard 684
(5) BATCo and Brown & Williamson 686
(6) RJ Reynolds 688
8. Conclusions 691

G. Defendants Have Publicly Denied What They Internally Acknowledged: that ETS Is Hazardous to Nonsmokers 692

1. Introduction 692
2. The Consensus of the Public Health Community Is that ETS Causes Disease in Nonsmokers 693
a. The Development of the Consensus 695

b. The Consensus 703
3. Internally, Defendants Recognized that ETS Is Hazardous to Non-smokers 708
a. ETS Research at Philip Morris's Institut für Biologische Forschung (INBIFO) 709
b. Defendants' Recognition of the Validity of the Hirayama Study ... 716
c. Other Internal Research and Statements Revealing Defendants' Knowledge of the Health Risks of Passive Smoking 718
4. Internally, Defendants Expressed Concern that the Mounting Evidence on ETS Posed a Grave Threat to Their Industry 720
5. Defendants Made Public Promises to Support Independent Research on the Link Betwen ETS and Disease 722
6. Defendants Undertook Joint Efforts to Undermine and Discredit the Scientific Consensus that ETS Causes Disease 723
a. Defendants Acted Through a Web of Coordinated and Interrelated International and Domestic Organizations 724
(1) 1975-1980: The Tobacco Institute ETS Advisory Group 724
(2) 1977-1991: "Operation Berkshire" 727
(3) 1987: Operation Downunder .. 732

(4) 1988-1999: The Center for Indoor Air Research (CIAR) .. 735
(a) CIAR Applied Projects ... 739
(b) Defendants Cultivated CIAR's Apparent Independence 742
(c) The Demise of CIAR 746
(5) Post-1991: IEMC 746
(6) The Global ETS Consultancy Program 752
(a) Establishment and Goals of the ETS Consultancy Program 752
(b) Implementation of the ETS Consultancy Program: Recruiting, Training, and Educating the Consultants 753
(c) The Indoor Air Pollution Advisory Group (IAPAG) . 757
(d) The Appearance of "Independence" 759
(e) Defendants' Use of Consultants 760
(f) ARIA and IAI 762
(g) The Industry's ETS Consultants Cited and/or Published Without Disclosure of Tobacco Industry Ties . 764
(h) ACVA/HBI 766
(7) ETS Symposia 767
(a) The 1974 Bermuda (Rylander) "Workshop" 768

(b) The Geneva (Rylander) Conference 769
(c) The Vienna Conference ... 771
(d) The 1987 Tokyo Conference 772
(e) The 1989 McGill "Symposium" 774
b. Defendants and Their Paid Consultants Controlled ETS Research Findings 777
(1) The 1995 Japanese Spousal Study 777
(2) The 1989 Malmfors/SAS Airline Study 781
(3) The 1992 HBI 585 Building Study 784
(4) The 2003 Enstrom/Kabat Study 786
7. Defendants Made False and Misleading Public Statements Denying that ETS Is Hazardous to Nonsmokers ... 788
8. Defendants Continue to Obscure the Fact that ETS is Hazardous to Nonsmokers 795
a. Websites and Other Public Statements 795
b. The Philip Morris External Research Program (PMERP) 798
c. Other Initiatives 799
9. Conclusions 800

H. At Various Times, Defendants Attempted to and Did Suppress and Conceal Scientific Research and Destroy Documents Relevant to Their Public and Litigation

Positions 801

1. Suppression and Concealment of Scientific Research 801
   a. R.J. Reynolds 802
   b. BAT Group 804
   c. Philip Morris 810
   d. Lorillard 814
2. Document Destruction Policies 814
   a. BAT Group 815
   b. R.J. Reynolds 831
3. Improper use of Attorney-Client and Work Product Privileges 832
   a. BAT Group 832
   b. R.J. Reynolds 836
   c. Liggett 836
   d. Findings by Other Courts 836
   4. Conclusions 839

VI. THE PROVISIONS AND IMPLICATIONS OF SETTLEMENT AGREEMENTS BY DEFENDANTS 839

A. Liggett's Settlement Agreement with Various States 839

B. The Master Settlement Agreement 841
   1. Provisions of the MSA 841
   2. Enforcement of the MSA 844
   3. Developments Since the MSA 848

VII. DEFENDANTS HAVE VIOLATED 18 U.S.C. 1962(c) 851

A. Introduction 851

B. Defendants Engaged in a Scheme to Defraud Smokers and Potential Smokers .. 852

1. Defendants Falsely Denied the Adverse Health Effects of Smoking 854
2. Defendants Falsely Denied that Nicotine and Smoking Are Addictive 856
3. Defendants Falsely Denied that They Manipulated Cigarette Design and Composition so as to Assure Nicotine Delivery Levels Which Create and Sustain Addiction 858
4. Defendants Falsely Represented that Light and Low Tar Cigarettes Deliver Less Nicotine and Tar and, Therefore, Present Fewer Health Risks than Full-Flavor Cigarettes ... 859
5. Defendants Falsely Denied that They Market to Youth 861
6. Defendants Falsely Denied that ETS Causes Disease 864
7. Defendants Suppressed Documents, Information, and Research 866

C. Defendants Established an Enterprise .. 867

1. Applicable Legal Standards 867
2. Defendants' Enterprise Had a Common Purpose 869
3. The Enterprise operated through both formal and informal organization 870
4. The Enterprise Has Functioned as a Continuous Unit 871

D. The Enterprise Engaged in and Its Activities Affected Interstate and Foreign Commerce 872

E. Each Defendant Was Associated with, but Distinct from, the Enterprise 873

1. Each Defendant Is Associated with the Enterprise 873
2. Each Defendant is Distinct from the Enterprise 875

F. Each Defendant Participated in the Conduct of the Enterprise 875

G. Each Defendant Carried Out Its Participation in the Conduct of the Enterprise by Engaging in a Pattern of Racketeering Activity 878

1. The Government Has Proven that Defendants Caused Mailings and Wire Transmissions, in Furtherance of the Scheme to Defraud, in Violation of 18 U.S.C. §§ 1341 and/or 1343 878

a. Defendants' Routine Mailing Practices 881
(1) Philip Morris 881
(2) Lorillard 881
(3) Liggett 881
(4) R.J. Reynolds 881
(5) The Tobacco Institute 882
(6) Council For Tobacco Research 882

b. Prior Stipulations and Admissions Establish the Mailings and Wire Transmissions Underlying 79 of the Alleged 145 Racketeering Acts 882

c. The Mailings and Wire Transmissions Underlying the Alleged Racketeering Acts Which Involve Defendants' Press Releases and Advertisements Were Disseminated to the Public Via the United States Mails and Wire Transmissions 882
d. Defendants Caused Wire, Radio, and Television Transmissions Underlying the Racketeering Acts 883
e. The Mailings and Wire Transmissions Involving Communications Were Sent or Received by Defendants or their Representatives 884
f. The Cigarette Company Defendants Are Liable for the Mailings and Wire Transmissions Underlying the Racketeering Acts Committed By Defendants CTR and TI 885
2. The First Amendment Does Not Protect Defendants' False and Misleading Public Statements 886
a. *Noerr-Pennington* Protects Only Those Defendants' Statements Made in the Course of Petitioning the Legislature; It Does Not Immunize Statements Made with the Purpose of Influencing Smokers, Potential Smokers, and the General Public 886

b. The Government Has Met the Necessary Standard of Proof to Show that Defendants' Actions Are Fraudulent 887
3. Defendants Engaged in a Pattern of Racketeering Activity in Furtherance of the Scheme to Defraud 889
a. Each Defendant Committed at Least Two Racketeering Acts, the Last One of Which Occurred Within Ten Years from the Commission of the Prior Racketeering Act 889
b. The Racketeering Acts Are Related and Continuous 889
(1) The Racketeering Acts Are Related 890
(2) The Racketeering Acts Have Been Continuous 890
4. Defendants Acted with the Specific Intent to Defraud or Deceive 891
a. Defendants Are Liable for the Acts of Their Officers, Employees, and Agents 892
b. Defendants Are Deemed to Possess the Collective Knowledge of Their Officers, Employees, and Agents 893
c. Specific Intent May Be Established by the Collective Knowledge of Each Defendant and of the Enterprise as a Whole 895

5. Defendants' False and Fraudulent Statements, Representations, and Promises Were Material 898

VIII. DEFENDANTS HAVE VIOLATED 18 U.S.C. § 1962(d) 901

A. Applicable Case Law 901

B. Each Defendant Is Liable for the RICO Conspiracy Charge Because Each Entered into the Requisite Conspiratorial Agreement 903

C. Liggett Withdrew from the Conspiracy . 906

IX. ALTRIA IS LIABLE FOR ITS VIOLATIONS OF 18 U.S.C. § 1962(c) and (d) 907

X. THERE IS A LIKELIHOOD OF PRESENT AND FUTURE VIOLATIONS OF RICO ... 908

A. Applicable Law 908

B. The Enterprise's Scheme to Defraud Presents Continuing Opportunities for Defendants to Commit Violations of 18 U.S.C. § 1962(c) and (d) 911

C. The MSA Has Not Sufficiently Altered Defendants' Conduct to Justify Not Imposing Appropriate Remedies 913

D. As to Certain Defendants, There is Not a Reasonable Likelihood of Future Violations of 18 U.S.C. § 1962(c) and (d) 915

1. CTR 915
2. The Tobacco Institute 916
3. Liggett 918

XI. REMEDIES 919
A. Legal Standards Governing Remedies .. 919
B. Specific Remedies 923
1. Prohibition of Brand Descriptors 923
2. Corrective Communications 925
3. Disclosure of Documents and Disaggregated Marketing Data 928
a. Depositories 929
b. Websites 930
c. Privilege Claims 931
d. Disaggregated Marketing Data ... 932
4. General Injunctive Provisions 932
5. National Smoker Cessation Program 933
6. Youth Smoking Reduction Targets .. 933
7. Corporate Structural Changes 934
8. Public Education and Countermarketing Campaign 936
9. Costs 937

I. INTRODUCTION

A. Overview

On September 22, 1999, the United States brought this massive lawsuit against nine cigarette manufacturers of cigarettes and two tobacco-related trade organizations. The Government alleged that Defendants have violated, and continue to violate, the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968, by engaging in a lengthy, unlawful conspiracy to deceive the American public about the health effects of smoking and environmental tobacco smoke, the addictiveness of nicotine, the health benefits from low tar, "light" cigarettes, and their manipulation

of the design and composition of cigarettes in order to sustain nicotine addiction. As Justice O'Connor noted in *Food and Drug Administration, et al. v. Brown & Williamson Tobacco Corporation, et al.*, 529 U.S. 120, 125, 120 S. Ct. 1291, 146 L. Ed. 2d 121 (2000), "[t]his case involves one of the most troubling public health problems facing our Nation today: the thousands of premature deaths that occur each year because of tobacco use."

In particular, the Government has argued that, for approximately fifty years, the Defendants have falsely and fraudulently denied: (1) that smoking causes lung cancer and emphysema (also known as chronic obstructive pulmonary disease ("COPD")), as well as many other types of cancer; (2) that environmental tobacco smoke causes lung cancer and endangers the respiratory and auditory systems of children; (3) that nicotine is a highly addictive drug which they manipulated in order to sustain addiction; (4) that they marketed and promoted low tar/light cigarettes as less harmful when in fact they were not; (5) that they intentionally marketed to young people under the age of twenty-one and denied doing so; and (6) that they concealed evidence, destroyed documents, and abused the attorney-client privilege to prevent the public from knowing about the dangers of smoking and to protect the industry from adverse litigation results.

The following voluminous Findings of Fact demonstrate that there is overwhelming evidence to support most of the Government's allegations. As the Conclusions of Law explain in great detail, the Government has established that Defendants (1) have conspired together to violate the substantive provisions of RICO, pursuant

to 18 U.S.C. § 1962(d), and (2) have in fact violated those provisions of the statute, pursuant to 18 U.S.C. § 1962(c). Accordingly, the Court is entering a Final Judgment and Remedial Order which seeks to prevent and restrain any such violations of RICO in the future.

In particular, the Court is enjoining Defendants from further use of deceptive brand descriptors which implicitly or explicitly convey to the smoker and potential smoker that they are less hazardous to health than full flavor cigarettes, including the popular descriptors "low tar," "light," "ultra light," "mild," and "natural." The Court is also ordering Defendants to issue corrective statements in major newspapers, on the three leading television networks, on cigarette "onserts," and in retail displays, regarding (1) the adverse health effects of smoking; (2) the addictiveness of smoking and nicotine; (3) the lack of any significant health benefit from smoking "low tar," "light," "ultra light," "mild," and "natural" cigarettes; (4) Defendants' manipulation of cigarette design and composition to ensure optimum nicotine delivery; and (5) the adverse health effects of exposure to secondhand smoke.

Finally, the Court is ordering Defendants to disclose their disaggregated marketing data to the Government in the same form and on the same schedule which they now follow in disclosing this material to the Federal Trade Commission. All such data shall be deemed "confidential" and "highly sensitive trade secret information" subject to the protective Orders which have long been in place in this litigation.

Unfortunately, a number of significant remedies proposed by the Government could not be considered by the Court because of a ruling by the Court of Appeals in

United States v. Philip Morris, USA, Inc., et al., 396 F.3d 1190 (D.C. Cir. 2005). In that opinion, the Court held that, because the RICO statute allows only forward-looking remedies to prevent and restrain violations of the Act, and does not allow backward-looking remedies, disgorgement (i.e., forfeiture of ill-gotten gains from past conduct) is not a permissible remedy.

Applying this same legal standard, as it is bound to do, this Court was also precluded from considering other remedies proposed by the Government, such as a comprehensive smoker cessation program to help those addicted to nicotine fight their habit, a counter marketing program run by an independent entity to combat Defendants' seductive appeals to the youth market; and a schedule of monetary penalties for failing to meet preset goals for reducing the incidence of youth smoking.

The seven-year history of this extraordinarily complex case involved the exchange of millions of documents, the entry of more than 1,000 Orders, and a trial which lasted approximately nine months with 84 witnesses testifying in open court. Those statistics, and the mountains of paper and millions of dollars of billable lawyer hours they reflect, should not, however, obscure what this case is really about. It is about an industry, and in particular these Defendants, that survives, and profits, from selling a highly addictive product which causes diseases that lead to a staggering number of deaths per year, an immeasurable amount of human suffering and economic loss, and a profound burden on our national health care system. Defendants have known many of these facts for at least 50 years or more. Despite that knowledge, they have consistently, repeatedly, and with enormous skill and sophistication, denied these

facts to the public, to the Government, and to the public health community. Moreover, in order to sustain the economic viability of their companies, Defendants have denied that they marketed and advertised their products to children under the age of eighteen and to young people between the ages of eighteen and twenty-one in order to ensure an adequate supply of "replacement smokers," as older ones fall by the wayside through death, illness, or cessation of smoking. In short, Defendants have marketed and sold their lethal product with zeal, with deception, with a single-minded focus on their financial success, and without regard for the human tragedy or social costs that success exacted.

Finally, a word must be said about the role of lawyers in this fifty-year history of deceiving smokers, potential smokers, and the American public about the hazards of smoking and second hand smoke, and the addictiveness of nicotine. At every stage, lawyers played an absolutely central role in the creation and perpetuation of the Enterprise and the implementation of its fraudulent schemes. They devised and coordinated both national and international strategy; they directed scientists as to what research they should and should not undertake; they vetted scientific research papers and reports as well as public relations materials to ensure that the interests of the Enterprise would be protected; they identified "friendly" scientific witnesses, subsidized them with grants from the Center for Tobacco Research and the Center for Indoor Air Research, paid them enormous fees, and often hid the relationship between those witnesses and the industry; and they devised and carried out document destruction policies and took shel-

ter behind baseless assertions of the attorney client privilege.[1]

What a sad and disquieting chapter in the history of an honorable and often courageous profession.

B. Preliminary Guidance for the Reader

Courts must decide every case that walks in the courthouse door, even when it presents the kind of jurisprudential, public policy, evidentiary, and case management problems inherent in this litigation. From the day this lawsuit was filed, it has garnered much media attention. Recognizing this, the Court hopes to assist the intrepid reader with her task by explaining certain principles and procedures that it has followed.

First and foremost, the Court has decided that, as fact finder, its obligation is to present to the appellate courts, the parties, and the public *all* the relevant facts which have been proven by a preponderance of this massive body of evidence consisting of testimony (including written direct examination, in-court cross examination, and re-direct examination of witnesses in this trial, as well as deposition and trial testimony of witnesses in related cases), and thousands of exhibits. By virtue of this procedure, the appellate courts will have before them all the factual determinations they need to decide

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[1] It would appear this situation continues even to the present. For example, in this very litigation, a former long-time career government lawyer was so intent on representing a company aligned with the Defendants that he grossly misrepresented in his pleadings and declaration to the Court the degree and substance of his earlier participation as government counsel in related litigation involving the Food and Drug Administration. As a result, he was disqualified from representing Defendant-Intervenor BATAS. *See* Order # 915.

the numerous legal issues which will unquestionably be raised.

Certain consequences flow from the decision to present the most complete factual picture possible. Even though this Opinion is unusually long and detailed, on occasion, there are very few facts presented on important issues and questions leap off the page to the reader. In those instances, it should be understood that the parties presented no further evidence and the Court has stated whatever Findings can be appropriately made on whatever evidence does exist; the record must remain bare as to the unanswered questions and the gaps in the evidence. On other occasions, some individual factual findings may appear unclear or inconsistent with other factual findings. In those instances, the Conclusion to that Section will contain the Court's final Findings, and its reasons for reaching them.

Second, in an effort to make the substance of the Opinion as accessible as possible, almost every Section of the Opinion in both the Findings of Fact and the Conclusions of Law contains an Introduction that provides an overview of the subject matter to be covered and a Conclusion that summarizes what has been found in that Section; the extensive detailed Findings between the Introduction and the Conclusion provide the factual "meat" between the two. In a few instances, Sections are so brief or so self-evident that no Introduction or Conclusion was necessary. Finally, Appendix I contains a Glossary of frequently used terms and concepts; Appendix II contains the relevant Surgeon Generals' Reports and their major findings; and Appendix III contains all the Racketeering Acts charged by the Government.

Third, every effort has been made to make each Section self-contained so that it is complete and understandable in and of itself. Thus, a reader who is interested in only a particular topic, such as youth marketing, can pick up that Section, and obtain the information he needs without having to read the entire Findings of Fact. However, it has been virtually impossible to totally segregate the Findings presented in each Section. At times, the historical data, the scientific data, and the relevant documentary materials overlap subject matter areas and therefore must be repeated in order to ensure that a Section can be read and understood by itself. By the same token, many individuals are identified numerous times in the text in an effort to make it easier for the reader to follow the narrative rather than having to search through many pages to re-familiarize himself with a person's position within either a Government agency or one of the Defendant corporations.

Fourth, specific record citations have been given whenever possible. Many times an individual Finding of Fact is either a direct quote from a witness's written or oral testimony or is taken directly from a proposed finding submitted by one of the parties and supported by the record and proved by at least a preponderance of the evidence. Vast amounts of testimony were given—by eminent and respected scientists, government officials and corporate executives. Only the portions of their testimony specifically cited in the Opinion were affirmatively credited and relied on by the Court. The Court has made it very clear when specific evidence referred to is being rejected or discredited.

Fifth, parties should understand that every Exhibit and Prior Testimony cited in the Findings of Fact is

deemed admitted into evidence. A formal Order, accompanying this Opinion, will be entered listing those hundreds (perhaps thousands) of Exhibit numbers and Prior Testimonies, overruling any objections made thereto.

Sixth, several observations need be made about witness bias and credibility. For the most part, each individual Chapter in the Findings of Fact explains why certain facts were found, why certain witnesses were credited, and why the testimony of certain witnesses was either discredited as just plain not believable or, in most instances, outweighed by other more convincing and credible evidence.

Most of the witnesses whose testimony was most vehemently attacked by the Defendants (such as Dr. David R. Kessler,[2] Dr. Michael C. Fiore, Dr. Jeffrey Wigand, and Dr. Cheryl Healton) were only relied upon for undisputed or relatively insignificant background facts (as with Dr. Kessler and Dr. Wigand), or testified about remedies which this Court could not consider on the merits under the Court of Appeals decision discussed above (as in the case of Dr. Fiore and Dr. Healton).

Much of the Defendants' criticisms of Government witnesses focused on the fact that these witnesses had been long-time, devoted members of "the public health community." To suggest that they were presenting inaccurate, untruthful, or unreliable testimony because they had spent their professional lives trying to improve the public health of this country is patently absurd. It is equivalent to arguing that all the Defendants' witnesses

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[2] As the Court has noted for the record on numerous occasions, Dr. Kessler is not related in any way.

were biased, inaccurate, untruthful, and unreliable because the great majority of them had earned enormous amounts of money working and/or consulting for Defendants and other large corporations, and therefore were so devoted to the cause of corporate America that nothing they testified to, even though presented under oath in a court of law, should be believed. Such simplistic attacks on the credibility of the sophisticated and knowledgeable witnesses who testified in this case are foolish.

All of this is not to deny that there were significant differences in the overall qualifications of the Government's witnesses and the Defendants' witnesses. There were. The Government's witnesses, viewed as a whole, were far more experienced, credentialed, and active in the area of smoking and health, whatever their particular area of specialty, than were the Defendants'. Many of the Government experts had participated extensively, over many years, in the long and drawn-out process of ascertaining the consensus of scientific opinions embodied in each Surgeon General's Report. Virtually every one had taught at a well-regarded academic institution and written numerous peer-reviewed articles in their particular area of specialty. Many of the Government witnesses continued "hands on," clinical work in their fields despite heavy commitments for research, writing, teaching, and lecturing to their peers.

The Defendants' witnesses were obviously well educated in their areas of specialty. Indeed, as was mentioned on many occasions, Defendants even presented the testimony of an impressive Nobel Prize winner. However, rarely did these witnesses have the depth and breadth of experience of the Government witnesses. Many had worked only in large corporations, and many

for only one or two such employers. Many—although not all—had written relatively few peer-reviewed articles. Many of the highest paid experts of Defendants, while well credentialed in their particular fields, such as economics, presented relatively narrow testimony tailored to the particular problem or issue they were retained to opine on for purposes of this litigation. A few of Defendants' experts had done virtually no individual research and written virtually no peer-reviewed articles, and a few were unfamiliar with the relevant facts and/or the major scientific literature on the issue about which they testified.

While the testimony of each person— expert or fact witness—was evaluated on its own merits, there can be no denying that, *as a group,* the Government's witnesses were far more knowledgeable, experienced, and active in their respective fields.

Finally, despite the length and detail of the Findings of Fact, the evidentiary picture must be viewed in its totality in order to fully appreciate how massive the case is against the Defendants, how irresponsible their actions have been, and how heedless they have been of the public welfare and the suffering caused by the cigarettes they sell.[8]

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[8] One cannot help wondering whether this litigation was the best vehicle for attempting to hold Defendants accountable for their indifference to the health of American citizens. In a democracy, it is the body elected by the people, namely Congress, that should step up to the plate and address national issues with such enormous economic, public health, commercial, and social ramifications, rather than the courts which are limited to deciding only the particular case presented to them in litigation. However, this will certainly not be the first, nor the last, time that litigants seek to use the courts and existing legislation to address broad-scale economic and social problems which might be far bet-

II. PROCEDURAL HISTORY

Plaintiff, the United States of America ("the Government") brought this suit in 1999 against eleven tobacco-related entities ("Defendants")[4] to recover health care expenditures the Government has paid or will pay to treat tobacco-related illnesses allegedly caused by Defendants' unlawful conduct. The Government also asked this Court to enjoin Defendants from engaging in fraudulent and other unlawful conduct and to order Defendants to disgorge the proceeds of their past unlawful activity.

In its original Complaint, the Government made four claims against Defendants under three federal statutes. The first statute, the Medical Care Recovery Act ("MCRA"), 42 U.S.C. §§ 2651-2653, provides the Govern-

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ter and more appropriately grappled with by our elected representatives.

[4] The eleven Defendants were: Philip Morris, Inc., now Philip Morris USA, Inc. ("Philip Morris"), R.J. Reynolds Tobacco Co., now Reynolds American ("R.J. Reynolds"), Brown & Williamson Tobacco Co., now part of Reynolds American ("Brown & Williamson"), Lorillard Tobacco Company ("Lorillard"), The Liggett Group, Inc. ("Liggett"), American Tobacco Co., merged with Brown & Williamson which is now part of Reynolds American ("American Tobacco"), Philip Morris Cos., now Altria ("Altria"), B.A.T. Industries P.L.C. ("BAT Ind."), now part of BATCo, British American Tobacco (Investments) Ltd. ("BATCo"), The Council for Tobacco Research–U.S.A., Inc. ("CTR"), and The Tobacco Institute, Inc. ("TI"). The latter two entities do not manufacture or sell tobacco products, but are alleged to be co-conspirators in Defendants' tortious activities. BAT Ind. has been dismissed for lack of personal jurisdiction. All Defendants but Liggett joined together in common defense (the "Joint Defendants"). In 2003, the Court granted the Motion of British American Tobacco Australian Services, Ltd. ("BATAS") to intervene for the limited purpose of asserting and protecting its interests in litigation documents. Order # 449.

ment with a cause of action to recover certain specified health care costs it pays to treat individuals injured by a third-party's tortious conduct (Count 1). The second statute is a series of amendments referred to as the Medicare Secondary Payer provisions ("MSP"), 42 U.S.C. § 1395y, which provides the Government with a cause of action to recover Medicare expenditures when a third-party caused an injury requiring treatment and a "primary payer" was obligated to pay for the treatment (Count 2). The third statute is the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968 (Counts 3 and 4), which provides private parties with a cause of action to recover treble damages due to injuries they received from a defendant's unlawful racketeering activity and the government with a cause of action to seek other equitable remedies to prevent future unlawful acts. Joint Defendants moved to dismiss the case on all counts. On September 28, 2000, the Motion was granted in part and denied in part, and Counts 1 and 2 were dismissed. *United States v. Philip Morris, Inc.*, 116 F. Supp. 2d 131 (D.D.C. 2000).

Continuing its case on Counts 3 and 4, the Government sought injunctive relief and $289 billion[5] in disgorgement of Defendants' ill-gotten gains for what it alleges to be an unlawful conspiracy to deceive the American public. The Government's Amended Complaint describes a four-decade long conspiracy, dating back to at least 1953, to intentionally and willfully deceive and mislead the American public about,*inter alia*, the harmful nature of tobacco products, the addictive nature of nicotine, and harmfulness of low tar cigarettes.

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[5] *See* United States' Preliminary Proposed Findings of Fact at 14.

Amended Complaint ("Am. Compl.") at ¶ 3. According to the Government, the underlying strategy Defendants adopted was to deny that smoking caused disease and to consistently maintain that whether smoking caused any kind of disease was still an "open question" for which no scientific consensus existed. Am. Compl. at ¶ 34. In furtherance of that strategy, Defendants allegedly issued deceptive press releases, published false and misleading articles, destroyed and concealed documents which indicated that there was in fact a correlation between smoking and disease, and aggressively targeted children as potential new smokers. Am. Compl. at ¶ 36.[6]

The parties engaged in intensive discovery for more than two years, with the assistance of Special Master Richard Levie overseeing disputes and issuing 172 Reports and Recommendations, the majority of which were appealed to this Court. During discovery, the parties exchanged over 4,000 requests for production of documents. Defendant alone made available to the Government over 26 million pages of documents. In addition, the parties each took over 1,000 hours of depositions. As discovery progressed and trial loomed, the Court held regularly scheduled and, when events necessitated it, irregularly scheduled status conferences and conference calls and oversaw the filing of many status reports and praecipes.

In addition, the parties filed, pursuant to limitations imposed by the Court, 18 summary judgment motions and countless motions in limine. The Court granted all of the Government's Motions for partial summary judgment to dismiss Defendants' Affirmative Defenses based

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[6] These allegations have been further described in *U.S. v. Philip Morris Inc.*, 116 F. Supp. 2d at 136-38.

on: (1) the assertion that the Federal Trade Commission had exclusive authority over Defendants' marketing activities (Order # 356); (2) waiver, equitable estoppel, laches, unclean hands and *in pari delicto* (Order # 476); (3) the assertion that the Government's claims and remedies sought violated the 8th Amendment of the Constitution and the Ex Post Facto Clause (Order # 509); (4) the assertion that constitutional separation of powers precludes the Government's claims (Order # 510); (5) the assertion that the RICO claims and relief sought are prohibited by the 10th Amendment of the Constitution and by separation of powers and that Defendants are not jointly and severally liable for any disgorgement ordered by the Court (Order # 538); and (6) res judicata, collateral estoppel, release, accord and satisfaction, and mootness (Order # 586). In addition, the Court granted the Government's Motions for partial summary judgment that each Defendant is distinct from the RICO enterprise (if the Court were to determine that there is an enterprise) and that a Defendants' liability for a RICO conspiracy does not require that Defendant to participate in the operation or management of the Enterprise (Order # 591). All other summary judgment motions of the Government and the Defendants were denied because the existence of material facts in dispute rendered summary judgment inappropriate.

Upon resolution of all preliminary matters, trial began on September 21, 2004. Together, the parties presented eighty four witnesses and tens of thousands of exhibits. The trial lasted nine months.

On February 4, 2004, our Circuit rendered a decision on an interlocutory appeal from this case. Defendants had appealed this Court's decision denying summary

judgment as to the Government's claim for disgorgement under 18 U.S.C. 1964(a). (Order # 550). In that opinion, written by Judge David Sentelle, the Court of Appeals determined that disgorgement is not a permissible remedy in civil RICO cases. *United States of America v. Philip Morris USA Inc., et al.*, 396 F.3d 1190 (D.C. Cir. 2005). As a result, because $280 billion in disgorgement was the centerpiece of its requested relief, the Government moved for leave to reformulate their proposed remedies. The Court granted that motion. After the liability phase of the trial concluded, the parties were allowed to put on evidence pertaining to the remedies sought by the Government.

At the conclusion of the remedies trial, several entities and organizations moved to intervene in order to assert their interests in the proposed relief. The Court granted the Motions to Intervene for the following parties: American Cancer Society; American Heart Association; American Lung Association; Americans for Nonsmokers' Rights; National African American Tobacco Prevention Network; and Tobacco-Free Kids Action Fund. These parties had a clear interest in advancing the public health and in the remedies proposed in this case.

In addition, the Court received numerous motions for leave to appear as amicus curiae, in support of the United States, from organizations who also wanted to assert their views on the appropriate and necessary remedies in this case. The Court granted the Motions of the following states and organizations because of their enormous collective knowledge and experience in the fields of public health, smoking, and disease: Arkansas; Connecticut; Hawaii; Idaho; Iowa; Kentucky; Louisiana;

Maryland; Massachusetts; Nevada; New Jersey; New Mexico; New York; Ohio; Oklahoma; Oregon; Tennessee; Vermont; Washington; Wisconsin; Wyoming; and the District of Columbia.; Citizens' Commission to Protect the Truth; Regents of the University of California; Tobacco Control Legal Consortium, including 18 additional nonprofit organizations; Essential Action; the City and County of San Francisco; the Asian Pacific Island American Health Forum; San Francisco African-American Tobacco Free Project; Black Network in Children's Emotional Health.[7]

On August 8, 2005, each side simultaneously submitted its 2,500 page Proposed Findings of Fact. As August turned into September, the Government filed its 250 page opening Post-trial brief; Defendants filed their 250 page opposition to the Government's brief and their 50 page opening brief on affirmative defenses; the Government filed its 100 page reply brief and 50 page opposition to Defendants' brief on affirmative defenses; and Defendants filed their 20 page reply brief on affirmative defenses.

The Court has issued 1010 Orders during the course of this arduous litigation. Some pundits have opined that this is the largest piece of civil litigation ever brought. The Court will leave that judgment to others.

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[7] To the extent that they are relevant, all arguments of the intervenors and amici have been considered and addressed.

FINDINGS OF FACT

III. CREATION, NATURE, AND OPERATION OF THE ENTERPRISE[8]

The following Section sets forth in enormous detail the intricate, interlocking, and overlapping web of national and international organizations, committees, affiliations, conferences, research laboratories, funding mechanisms, and repositories for smoking and health information which Defendants established, staffed, and funded in order to accomplish the following goals: counter the growing scientific evidence that smoking causes cancer and other illnesses, avoid liability verdicts in the growing number of plaintiffs' personal injury lawsuits against Defendants, and ensure the future economic viability of the industry.

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IV. THE DEFENDANTS ARE ENGAGED IN AND THEIR ACTIVITIES AFFECT INTERSTATE AND FOREIGN COMMERCE

486. Defendants in this case at all relevant times have been and are engaged in interstate and foreign commerce and their activities have affected, and continue to affect, interstate and foreign commerce within the meaning of 18 U.S.C. § 1962(c) and (d). Regarding Defendant-members of this RICO enterprise, the Court finds the following facts.

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[8] "Enterprise" is a statutory term contained in 18 U.S.C. § 1962(c). The Court's use of it in these Findings does not imply that Defendants' activities meet the statutory definition contained in 18 U.S.C. § 1961(4). That issue will be fully discussed in the Conclusions of Law.

V. DEFENDANTS DEVISED AND EXECUTED A SCHEME TO DEFRAUD CONSUMERS AND POTENTIAL CONSUMERS OF CIGARETTES IN MOST, BUT NOT ALL, OF THE AREAS ALLEGED BY THE GOVERNMENT

A. Defendants Have Falsely Denied, Distorted and Minimized the Significant Adverse Health Consequences of Smoking for Decades

509. Cigarette smoking causes disease, suffering, and death. Despite internal recognition of this fact, Defendants have publicly denied, distorted, and minimized the hazards of smoking for decades. The scientific and medical community's knowledge of the relationship of smoking and disease evolved through the 1950s and achieved consensus in 1964. However, even after 1964, Defendants continued to deny both the existence of such consensus and the overwhelming evidence on which it was based.

1. Cigarette Smoking Causes Disease

510. Cigarette smoking and exposure to secondhand smoke (also known as environmental tobacco smoke or "ETS") kills nearly 440,000 Americans every year. The annual number of deaths due to cigarette smoking is substantially greater than the combined annual number of deaths due to illegal drug use, alcohol consumption, automobile accidents, fires, homicides, suicides, and AIDS. Approximately one out of every five deaths that occur in the United States is caused by cigarette smoking. * * *

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7. Conclusions

822. Defendants have been aware since the late 1950s of substantial evidence demonstrating that smoking causes significant adverse health effects, in particular, lung cancer. The evidence was presented by practicing physicians, such as Michael DeBakey, Alton Oschner, and Richard Overholt, by academic scientists, such as Evarts Graham and Ernst Wynder, and by government officials such as Surgeon General Leroy Burney in his 1959 JAMA article.

823. By 1964, when the Surgeon General of the United States, Luther Terry, issued his ground-breaking Report considering some 7,000 scientific articles on the relationship between smoking and health, there could no longer be any question that there was a consensus in the American scientific community "that cigarette smoking contributes substantially to mortality from certain specific diseases and to the overall death rate," that "[c]igarette smoking is associated with a 70 percent increase in the age-specific death rates of males," that "[c]igarette smoking is causally related to lung cancer in men," and that the "data for women, though less extensive, point in the same direction." In 1968, the Surgeon General concluded that "cigarette smoking can contribute to the development of cardiovascular disease and particularly to death from coronary heart disease."

824. From at least 1953 until at least 2000, each and every one of these Defendants repeatedly, consistently, vigorously—and falsely—denied the existence of any adverse health effects from smoking. Moreover, they mounted a coordinated, well-financed, sophisticated public relations campaign to attack and distort the scientific evidence demonstrating the relationship between

smoking and disease, claiming that the link between the two was still an "open question." Finally, in doing so, they ignored the massive documentation in their internal corporate files from their own scientists, executives, and public relations people that, as Philip Morris's Vice President of Research and Development, Helmut Wakeham, admitted, there was "little basis for disputing the findings [of the 1964 Surgeon General's Report] at this time."

825. Indeed, as far back as 1968, William Kloepfer, Vice President of Public Relations for the Tobacco Institute recognized that "[o]ur basic position in the cigarette controversy is subject to the charge, and may be subject to a finding, that we are making false or misleading statements to promote the sale of cigarettes." Mr. Kloepfer was both correct and prescient.

826. For more than forty years after issuance of the Frank Statement in 1954, and for more than thirty years after issuance of the Surgeon General's first Report on smoking and health, Defendants maintained their position denying the causal relationship between smoking and disease. Finally, in 1999, Philip Morris launched a corporate website acknowledging the "overwhelming medical and scientific consensus that cigarette smoking causes lung cancer, heart disease, emphysema, and other serious disease in smokers." Despite this acknowledgment of the "overwhelming medical and scientific consensus," Philip Morris could not bring itself to clearly state its agreement with that consensus until October 2000. Philip Morris still does not include the information on its cigarette packaging that it agrees that smoking causes cancer and other diseases in smokers.

827. Neither RJR, Lorillard, nor B & W, have openly admitted that smoking causes cancer. Indeed, in 2000, two years after the effective date of the Master Settlement Agreement, B & W was putting the following message on its website: "We know of no way to verify that smoking is a cause of any particular person's adverse health or why smoking may have adverse health effects on some people and not others."

B. *The Addictive Properties of Nicotine*

1. Introduction

828. Cigarette smoking is an addictive behavior, characterized by drug craving, compulsive use, tolerance, withdrawal symptoms, and relapse after withdrawal. Underlying the smoking behavior and its remarkable intractability to cessation is the drug nicotine. Nicotine is the primary component of cigarettes that creates and sustains addiction to cigarettes. While the terminology of addiction has evolved over time, the underlying facts about the addictive nature of smoking and the centrality of nicotine to the addiction have been known and have not changed in over 40 years.

829. Since the 1950s, Defendants have researched and recognized, decades before the scientific community did, that nicotine is an addictive drug, that cigarette manufacturers are in the drug business, and that cigarettes are drug delivery devices. The physiological impact of nicotine explains in large part why people use tobacco products and find it so difficult to stop using them. Moreover, Defendants have sought to exploit the addictive quality of smoking and nicotine for decades in order to develop new products and increase sales.

830. Notwithstanding the understanding and acceptance of each Defendant that smoking and nicotine are addictive, Defendants have publicly denied and distorted the truth as to the addictive nature of their products for several decades. Defendants have publicly denied that nicotine is addictive, have suppressed research showing its addictiveness, and have repeatedly used misleading statistics as to the number of smokers who have quit voluntarily and without professional help.

831. Defendants have intentionally maintained and coordinated their position on addiction and nicotine as an important part of their overall efforts to influence public opinion and persuade people that smoking was not dangerous; in this way, the cigarette company Defendants could keep more smokers smoking, recruit more new smokers, and maintain or increase their earnings. Additionally, Defendants have sought to discredit evidence of addiction in order to preserve their "smoking is a free choice" argument in smoking and health litigation.

832. Defendants, with the exception of Philip Morris, continue to publicly deny and distort the truth as to the addictiveness of cigarette smoking and nicotine's role in the addiction. Defendants ignore their own internal statements acknowledging and exploiting nicotine addiction. While nicotine shares certain key attributes of heroin, cocaine, and other drugs, Defendants continue to assert that smoking is no more addictive than coffee, chocolate, and exercise, and (with the exception of Philip Morris) continue to deny that nicotine is addictive at all.

* * * * *

6. Conclusions

1359. For approximately forty years, Defendants publicly, vehemently, and repeatedly denied the addictiveness of smoking and nicotine's central role in smoking. They made these denials out of fear that public acknowledgment of what was so well documented and widely accepted internally within their corporate offices and scientific laboratories could result in governmental (*i.e.*, FDA) regulation, adverse liability judgments from addicted smokers suffering the adverse health effects of smoking, loss of social acceptability of smoking, and the ultimate loss of corporate profits. The evidence spelled out above is simply overwhelming that Defendants knew that smoking is addictive and knew that nicotine is the agent creating and sustaining that addiction. There is also overwhelming evidence that even though Defendants have known internally about addiction for decades, they have endeavored to keep the extensive research and data they had accumulated out of the public domain and out of the hands of the public health community by denying that such data existed, by refusing to disclose it, and by shutting down or censoring laboratories and research projects which were investigating the mechanisms of nicotine.

1360. Defendants assert that the public health community and the public itself has known for decades that nicotine produced dependence. For example, Defendants cite to the 1962 publication of the well respected Larson, Haag and Silvette compendium, Tobacco Experimental and Clinical Studies, which described nicotine's effects on the human nervous system and summarized existing research suggesting that people smoke to obtain nicotine, that nicotine has pharmacological effects,

and that nicotine is addictive or habituating. (no bates) (JD-000500). Defendants also cite to the United States Supreme Court comment that, when Congress enacted the Federal Cigarette Labeling Act in 1965, "the adverse health consequences of tobacco were well known, as were nicotine's pharmacological effects." *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 138, 120 S. Ct. 1291, 146 L. Ed. 2d 121 (2000). Even if there is truth to Defendants' speculation that "everyone knew" of nicotine's addictiveness, there is no question that the public health community lacked the substantial and sophisticated understanding of nicotine's effects and role that Defendants possessed. Put quite simply, if the Surgeon General of the United States possessed the information and data Defendants possessed prior to publication of his 1964 Report, it is simply not possible that he would have ignored it.

1361. Moreover, there is a basic inconsistency in Defendants' position. If, in fact, "everybody knew" that smoking and nicotine were addictive, then why were Defendants publicly, vehemently, and repeatedly denying it?

1362. Defendants' denials misled the public about why quitting smoking is so difficult, exactly how difficult it is, and about why failure to quit is not simply a function of personal weakness or lack of willpower. In short, after reassuring the smoker that smoking was not bad for her health, and was not addictive, Defendants then blamed her for being unable to stop using the product they had so successfully marketed with false information.

1363. Defendants did not simply deny that smoking warranted the label "addiction"; they denied the entire

concept of physiological dependence. The semantic battle Defendants have waged in the public realm and at trial is a distraction from the fact that, whether using the word "dependence" or "addiction," the core concept is the compulsive and uncontrollable use of nicotine reflected in drug-seeking and drug-taking behavior, all of which Defendants deny exist.

1364. Based on the extensive individual Findings of Fact set forth in this Section, the Court finds that Defendants have known for decades that cigarette smoking was addictive, and that nicotine is the addicting element in smoking behavior. Defendants' false and misleading statements relating to addiction continue even today.

1365. Moreover, Defendants deliberately and intentionally hid this information from the public and closed down research laboratories and on-going projects in order to ensure secrecy. Time and time again, Defendants falsely denied these facts to smokers and potential smokers, to government regulatory authorities, to the public health community and to the American public.

C. Nicotine "Manipulation": Defendants Have Falsely Denied That They Can and Do Control the Level of Nicotine Delivered In Order to Create and Sustain Addiction

1366. As demonstrated in the previous Section, Defendants have long known that nicotine creates and sustains an addiction to smoking and that cigarette sales, and ultimately tobacco company profits, depend on creating and sustaining that addiction. Section V(B)(3), *supra*. Given the importance of nicotine to the ultimate financial health of Defendants, they have undertaken extensive research into how nicotine operates within the human body and how the physical and chemical design

parameters of cigarettes influence the delivery of nicotine to smokers. Using the knowledge produced by that research, Defendants have designed their cigarettes to precisely control nicotine delivery levels and provide doses of nicotine sufficient to create and sustain addiction. At the same time, Defendants have concealed much of their nicotine-related research, and have continuously and vigorously denied their efforts to control nicotine levels and delivery.

1367. Defendants, individually, jointly, and through third parties, have extensively studied smoking intake and inhalation, compensation, addiction physiology, smoker psychology, the pharmacological aspects of nicotine, the effects of nicotine on brain waves, and related subjects. As a result of this research, cigarette company Defendants have been aware for decades that cigarettes are addictive and that smoking addiction is caused primarily by the delivery of dependence-producing levels of nicotine.

1368. The typical cigarette contains far more nicotine than an individual will inhale as he or she smokes. Farone WD, 86:16-19; Henningfield WD, 35:16-36:16. Every aspect of a cigarette is precisely tailored to ensure that a cigarette smoker can pick up virtually any cigarette on the market and obtain an addictive dose of nicotine. Farone WD, 3:12-22. Most cigarettes are manufactured using reconstituted tobacco material, additives, burn accelerants, ash conditioners, and buffering substances, all of which affect nicotine levels and delivery. Other cigarette design features used by Defendants to control nicotine delivery include filter design, paper selection and perforation, ventilation holes, leaf

blending, and use of additives (such as ammonia) to control the PH of cigarette smoke.

1369. During the 1960s and 1970s, the public health community urged development of low-tar cigarettes as a healthier alternative to the "full-flavored" cigarettes which then dominated the market. In response, cigarette company Defendants developed low-tar cigarettes. They then falsely maintained that nicotine levels were inextricably linked to tar levels, and that nicotine levels would, of necessity, proportionately fall, as fast and as far as the tar levels in the newer low-tar cigarettes.

1370. In the early 1970s, the Federal Trade Commission developed a machine to measure tar and nicotine levels. Even though it became the accepted mechanism for taking such measurements, it became widely known in both the public health community and by the cigarette company Defendants that the FTC method did not accurately measure the amounts of nicotine and tar which a smoker actually ingested. Cigarette company Defendants, with the benefit of their much more sophisticated understanding of smoker compensation, as well as their knowledge of nicotine control, then intentionally developed and marketed cigarettes which, in actuality, delivered higher levels of nicotine than those measured by the FTC method. Those levels of nicotine were sufficient to create and sustain addiction in smokers.

* * * * *

4. Conclusions

1758. The Defendants have repeatedly made vigorous and impassioned public denials—before Congressional committees, in advertisements in the national print media, and on television—that neither smoking nor nico-

tine is addictive, and that they do not manipulate, alter, or control the amount of nicotine contained in the cigarettes they manufacture. The Findings of Fact contained in this Section and Section V(B), *supra*, provide overwhelming evidence that those statements are false.

1759. As established by the Findings of Fact set forth in this Section, cigarette company Defendants researched, developed, and implemented many different methods and processes to control the delivery and absorption of the optimum amount of nicotine which would create and sustain smokers' addiction. These methods and processes included, but were not limited to: altering the physical and chemical make-up of tobacco leaf blends and filler; maintaining or increasing the nicotine to tar ratio by changing filter design, ventilation and air dilution processes, and the porosity and composition of filter paper; altering smoke pH by adding ammonia to speed nicotine absorption by the central nervous system; and using other additives to increase the potency of nicotine.

1760. The fact that some of these methods and processes may also have been used, as Defendants argued, to improve flavor and taste, especially of low tar cigarettes as they were developed in response to the fears of the public about the adverse health effects of smoking, is in no way inconsistent with these Findings of Fact that Defendants also used them to manipulate, and increase the amount and form of nicotine delivered in cigarettes.

1761. Nor is the fact that during the 1970s, the public health community may have encouraged the development of low tar cigarettes because it believed—erroneously—that nicotine levels would fall as tar levels fell,

in any way inconsistent with these Findings of Fact. What the public health community did or did not know is irrelevant to the issue of what Defendants knew about the relationship between nicotine and tar and whether they knowingly made false public statements about that relationship.

1762. The words of Defendants themselves establish that the goal of their extensive efforts, through research and experimentation, to control the levels of nicotine delivery was to ensure that smokers obtained sufficient nicotine to create and sustain addiction:

> Philip Morris listed as one of the achievements of its Electrophysiological Studies Research Group a discovery "that there are optimal cigarette nicotine deliveries for producing the most favorable physiological and behavioral responses." ¶ 947, *supra*.
>
> RJR's "top priority [was] to develop and market low 'tar' brands . . . that: [m]aximize the physiological satisfaction per puff—the single most important need of smokers." ¶ 1431, *supra*.
>
> BATCo named as a "high priority" development of "alternative designs (that do not invite obvious criticism) which will allow the smoker to obtain significant enhanced deliveries should he so wish." ¶ 1460, *supra*.
>
> The "major objective" of Lorillard's study of filter design was to "increase the physiological impact and/or nicotine to tar ratio in ultra low tar cigarettes." ¶ 1488, *supra*.

1763. In sum, the evidence as presented in these Findings of Fact is overwhelming that Defendants have,

over the course of many years, time and again—and with great self-righteousness—denied that they manipulated the nicotine in cigarettes so as to increase the addiction and dependence of smokers. Those denials were false.

D. The Government Has Failed to Prove by a Preponderance of the Evidence that Defendants Deliberately Chose Not to Utilize or Market Feasible Designs or Product Features that Could Produce Less Hazardous Cigarettes.

* * * * *

7. Conclusions

2018. After weighing and evaluating all the specific Facts found in the foregoing Section, the Court concludes that the Government has failed to carry its burden of proving, by a preponderance of the evidence, that Defendants deliberately chose to sabotage the successful marketing and production of less hazardous cigarettes. As these Facts demonstrate, Philip Morris and RJR, in particular, as well as Lorillard and Liggett to a lesser extent, spent many years, enormous amounts of money, and the creative energies of their top scientists to investigate different approaches to production of cigarettes which would present fewer health risks to the public.

2019. Those efforts failed for many reasons: some approaches proved to be scientific and technological failures, such as the effort to reduce nitrogen oxide and harmful TSNAs, and the effort to develop a nicotine analogue; some could not gain consumer acceptability because of unpleasant taste, such as the charcoal filter cigarettes Saratoga, Tempo, and York; some could not gain consumer acceptability because they were too dis-

similar from traditional cigarettes, such as Accord, Premier, and Eclipse.

2020. The Government may well be correct that more effective marketing and advertising which focused on the health benefits of these newly developed cigarettes could have overcome the consumer resistence to them. However, Defendants were operating in a regulatory climate where their fears of litigation with the Federal Trade Commission were by no means unreasonable given cases which the Commission had actually brought and won. Moreover, Defendants faced petitions filed with the FTC by advocacy groups which believed that cessation of all smoking was the only effective answer to the public health problem, and therefore opposed introduction of any new cigarette, no matter how much less risk it might pose to health.

2021. Finally, it simply strains credulity to conclude that these Defendants—whose prime mission in life is to make money—would pour hundreds of millions of dollars, as well as huge amounts of scientific and technical resources, into the development and marketing of less hazardous cigarettes and then deliberately choose to reject the benefits of their investment of money and brainpower. Defendants understood full well that the first company to succeed in producing a consumer-acceptable less hazardous cigarette would dominate the market in record time.

2022. For these reasons, the Court finds that the Government has not proved, by a preponderance of the evidence, that Defendants deliberately kept less hazardous cigarettes off the market.

E. Defendants Falsely Marketed and Promoted Low Tar/Light Cigarettes as Less Harmful than Full-Flavor Cigarettes in Order to Keep People Smoking and Sustain Corporate Revenues

2023. For several decades, Defendants have marketed and promoted their low tar brands as being less harmful than conventional cigarettes. That claim is false, as these Findings of Fact demonstrate. By making these false claims, Defendants have given smokers an acceptable alternative to quitting smoking, as well as an excuse for not quitting.

2024. Defendants used a combination of techniques to market and promote their low tar brands. Defendants' marketing has emphasized claims of low tar and nicotine delivery accompanied by statements that smoking these brands would reduce exposure to the "controversial" elements of cigarette smoke *(i.e.*, tar). Since the 1970s, Defendants also have used so-called brand descriptors such as "light" and "ultra light" to communicate reassuring messages that these are healthier cigarettes and to suggest that smoking low tar cigarettes is an acceptable alternative to quitting. In addition to appealing advertising and easily-remembered brand descriptors, Defendants have used sophisticated marketing imagery such as lighter color cigarette packaging and white tipping paper to reinforce the same message that these brands were low in tar and therefore less harmful. See Section V(E)(5), *infra* (Defendants' deceptive marketing of low tar cigarettes).

2025. Even as they engaged in a campaign to market and promote filtered and low tar cigarettes as less harmful than conventional ones, Defendants either lacked evidence to substantiate their claims or knew

them to be false. Indeed, internal industry documents reveal Defendants' awareness by the late 1960s/early 1970s that, because low tar cigarettes do not actually deliver the low levels of tar and nicotine which are advertised, they are unlikely to provide any clear health benefit to human smokers, as opposed to the FTC smoking machine, when compared to regular, full flavor cigarettes.

2026. As Defendants have long been aware, nicotine delivered by cigarettes is addictive *(see* Section V(B)(3), *supra* (addiction)). Defendants' internal documents demonstrate their understanding that, in order to obtain an amount of nicotine sufficient to satisfy their addiction, smokers of low tar cigarettes modify their smoking behavior, or "compensate," for the reduced nicotine yields by taking more frequent puffs, inhaling smoke more deeply, holding smoke in their lungs longer, covering cigarette ventilation holes with fingers or lips, and/or smoking more cigarettes. See Section V(E)(2)(b), *infra* (smoker compensation). As a result of this nicotine-driven smoker behavior, smokers of light cigarettes boost their intake of tar, thus negating what Defendants have long promoted as the primary health-related benefit of light cigarettes: lower tar intake.

2027. Defendants did not disclose the full extent and depth of their knowledge and understanding of smoker compensation to the public health community or to government regulators.

2028. Defendants' conduct relating to low tar cigarettes was intended to further their overarching economic goal: to keep smokers smoking; to stop smokers from quitting; to encourage people, especially young

people, to start smoking; and to maintain or increase corporate profits.

* * * * *

6. Conclusions

2626. The evidence set forth above overwhelmingly establishes the following facts.

2627. It is clear, based on their internal research documents, reports, memoranda, and letters, that Defendants have known for decades that there is no clear health benefit from smoking low tar/low nicotine cigarettes as opposed to conventional full-flavor cigarettes. It is also clear that while Defendants knew that the FTC Method for measuring tar and nicotine accurately compared the nicotine/tar percentages of different cigarettes, they also knew that that Method was totally unreliable for measuring the actual nicotine and tar any real-life smoker would absorb because it did not take into account the phenomenon of smoker compensation. Defendants also knew that many smokers were concerned and anxious about the health effects of smoking, that a significant percentage of those smokers were willing to trade flavor for reassurance that their brands carried lower health risks, and that many smokers who were concerned and anxious about the health risks from smoking would rely on the health claims made for low tar cigarettes as a reason, or excuse, for not quitting smoking.

2628. Despite this knowledge, Defendants extensively—and successfully—marketed and promoted their low tar/light cigarettes as less harmful alternatives to full-flavor cigarettes. Moreover, Defendants opposed any changes in the FTC Method which would more accu-

rately reflect the effects of compensation on the actual tar and nicotine received by smokers, denied that they were making any health claims for their low tar/light cigarettes, and claimed that their marketing for these cigarettes was based on smokers' preference for a "lighter," "cleaner" taste.

2629. By engaging in this deception, Defendants dramatically increased their sales of low tar/light cigarettes, assuaged the fears of smokers about the health risks of smoking, and sustained corporate revenues in the face of mounting evidence about the health dangers of smoking.

F. From the 1950s to the Present, Different Defendants, at Different Times and Using Different Methods, Have Intentionally Marketed to Young People Under the Age of Twenty-one in Order to Recruit "Replacement Smokers" to Ensure the Economic Future of the Tobacco Industry

1. Definition of Youth

2630. There is much confusion, both in the internal documents of Defendants and the various kinds of evidence introduced in this trial, over the definition of the term "youth."

2631. In most states, the legal age at which a person can purchase cigarettes is eighteen. The exceptions are Alabama, Alaska, and Utah, where the legal age is nineteen, and Massachusetts, where the legal age is twenty. Defendants argue that so long as they are marketing to persons over the legal age, they are not marketing to "youth." That approach is both simplistic and inaccurate.

2632. Defendants' own internal documents make constant reference to eighteen to twenty-one year olds as "youth." Defendants' public utterances often use the word "youth" to refer to those under the age of eighteen, as well as to those between eighteen and twenty-one. The expert witnesses on both sides also used the term interchangeably to refer to those under eighteen and those between eighteen and twenty-one. In short, no uniform and consistent definition of the term was used by any party to define the age parameters for the term "youth." Moreover, it is clear from the evidence that the eighteen to twenty-one year age bracket encompasses young people transitioning to adulthood who are deciding whether or not to experiment with smoking, who are still immature and at their most vulnerable to the blandishments of advertising and marketing, and who are usually not yet addicted, heavy smokers.

2633. Given this background, and Defendants' repeated assertions that their marketing is directed at maintaining brand loyalty and attracting brand "switchers" rather than inducing "youth" to initiate smoking, the Court finds that defining the term "youth" to include those twenty-one and under is the most appropriate definition, as well as the one used most frequently by the parties.

2. The Defendants Need Youth as Replacement Smokers

2634. Every year, over 400,000 people die of smoking related diseases. In addition, there are a relatively small number of people who quit smoking each year. In order to sustain and perpetuate themselves, Defendants must bring in new smokers to replace those leaving the market. Each cigarette manufacturing company gains

a small amount (less than 10%) of smokers through "switching" or changing brands. Only about 9% of adult smokers switch among Defendants' brands. Krugman WD, 154:31-158:5; *see also* 2045165002-5014 (U.S. 38402). Defendants' own employees admit that brand switching rates are low and falling. According to David Beran, Executive Vice President of Strategy, Communications and Consumer Contact for Philip Morris, the brand switching rate for 1997 was 4.0%, Beran TT, 4/18/05, 19395:15-17 (Confidential) (closed court); (no bates) (JD 053375) (Confidential); was 6.3% for 2002, Beran TT, 4/18/05, 19322:16-25; (no bates) (JDEM 040331); and was 5.4% for 2003. (no bates) (JD053375) (Confidential); Beran TT, 4/18/05, 19394:25-19395:3. Switching, by definition, does not bring in new smokers to the industry as a whole.

2635. The only way Defendants can sustain themselves is by bringing in large numbers of replacement smokers each year. Carl Schoenbachler, current president and CEO of BATIC (a former parent of B & W Tobacco and holding entity for B & W Tobacco) acknowledged that although the company has a stated policy of not marketing to non-smokers, "it was a reasonable conclusion" that B & W would become unprofitable if non-smokers did not become smokers. Schoenbachler PD, *United States v. Philip Morris*, 5/21/02, 72:16-21, 73:13-22, 141:11-141:21, 152:20-25.

2636. The majority of people who become addicted smokers start smoking before the age of eighteen, and many more before the age of twenty-one. Ellen Merlo, Senior Vice President at Philip Morris, admitted that she was aware that over 80% of smokers start smoking before they turn eighteen. Merlo PD, *United States v.*

Philip Morris, 6/11/02, 42:22-45:15, 48:2-48:6. A 1989 RJR document titled "Camel Y & R Orientation" discussed the "strategic importance" of young adult smokers ("YAS"): "YAS are the only source of replacement smokers. Less than one-third of smokers start after age 18." The document further stated: "To stabilize RJR's share of total smokers, it must raise share among 18-20 from 13.8% to 40% . . . ASAP." 507241613-1838 at 1617, 1620 (U.S. 20774). In a September 20, 1982 memorandum, Diane S. Burrows, RJR Marketing Development Department researcher, stated, "if a man has never smoked by age 18, the odds are three-to-one he never will. By age 21, the odds are twenty-to-one." 500582269-2272 at 2270 (U.S. 20641).

2637. Moreover, smokers are remarkably brand-loyal. LeVan PD, *United States v. Philip Morris*, 6/25/02, 225:3-228:12, 229:4-230:11 ("premium tobacco brands and smokers are very highly loyal and . . . they don't switch brands very often."). Defendants realize that they need to get people smoking their brands as young as possible in order to secure them as lifelong loyal smokers. As Bennett LeBow, President of Vector Holdings Group, stated, "if the tobacco companies really stopped marketing to children, the tobacco companies would be out of business in 25 to 30 years because they will not have enough customers to stay in business." LeBow WD, 63:16-64:1.

2638. In internal documents, Defendants admit that stimulating youth smoking initiation and retaining and increasing their share of the youth market is crucial to the success of their businesses. For example, in a 1999 slide presentation, titled "ASU30 [Adult Smoker Under 30] Project," manager Rick Stevens analyzed BATCo's

"ASU30 Performance 1998," stating that younger adult smokers were a "critical factor in the growth and decline of every major brand and company over the last 50 years." Furthermore, a slide, titled "Value of YAS," recognized that "[m]arket renewal is almost entirely from 18 year old smokers" and "[n]o more than 5% start smoking after age 24." 321539777-9806 at 9782, 9787-9788 (U.S. 24084); *see also* 2041518797-8956 at 8819-8820 (U.S. 23907).

2639. Defendants know that marketing their cigarettes to youth is essential to each company's success and longevity, and for that reason create marketing campaigns designed to increase youth consumption. VXA1240104-0567 at 0272 (U.S. 64316) (2000 Surgeon General Report noting that "considerable evidence" demonstrates that "advertising and promotion recruit new smokers"). As United States marketing expert Dr. Robert Dolan explained:

> The trend in tobacco companies' spending on marketing has continued to increase dramatically. Tobacco industry spending of $2 billion on advertising and promotion in 1980 reached $4 billion in 1988 and then $6 billion in 1994. After four years around the $6 billion mark, spending shot up [to] $11.2 billion by 2001. In 2002, the last year for which data is available, the tobacco companies spent $12.47 billion, an increase of 11.61% over 2001. The fundamental dynamic of the industry has not changed though. The tobacco companies knew that brand loyalty is a key phenomenon and if someone doesn't start smoking as a teenager, he or she is unlikely to start. . . . Defendants still represent that the only objective of marketing is impacting brand choice while they im-

> plement marketing programs which increase the value potential customers see in smoking—attracting people including teenagers to the market and deterring others from quitting.

Dolan WD, 147:10-148:18; 2070802707-2770 at 2728 (U.S. 89172).

2640. In a February 29, 1984 memorandum, titled "Younger Adult Smokers: Strategies and Opportunities," to Martin Orlowsky, CEO of Lorillard, Diane Burrows, market researcher at R.J. Reynolds, stated:

> Younger adult smokers have been the critical factor in the growth and decline of every major brand and company over the last 50 years. They will continue to be just as important to brands/companies in the future for two simple reasons:
>
> [1] The renewal of the market stems almost entirely from 18-year old smokers. No more than 5% of smokers start after age 24.[2] The brand loyalty of 18-year-old smokers far outweighs any tendency to switch with age. . . . Marlboro and Newport, the only true younger adult growth brands in the market, have no need for switching gains. All of their volume growth can be traced to younger adult smokers and the movement of the 18-year-olds which they have previously attracted into older age brackets, where they pay a consumption dividend of up to 30%. A strategy which appealed to older smokers would not pay this dividend. . . . Younger adult smokers are the only source of replacement smokers. Repeated government studies . . . have shown that: Less than one-third of smokers (31%) start after age 18. . . . Thus, today's younger adult smoking be-

> havior will largely determine the trend of Industry volume over the next several decades. If younger adults turn away from smoking, the Industry must decline, just as a population which does not give birth will eventually dwindle.

503049069-9072 at 9069 (U.S. 20711); 501431517-1610 at 1519 (U.S. 20680); 506653291-3348 at 3291, 3296 (U.S. 85235).

2641. In an April 13, 1984 RJR letter, R.C. Nordine stated that "[i]t is relatively easy for a brand to retain eighteen-year-old smokers once it has attracted them. . . . Conversely, it is very difficult to attract a smoker that has already been won over by a different brand." 502033156-3157 at 3156 (U.S. 49017).

2642. A March 1988 report, titled "Younger Adult Smoker Opportunity," discussed "RJR's most critical strategic need—Younger Adult Smokers." The report stated: "Improved younger adult development is a key Corporate priority . . . —Necessary for core brand revitalization (# 1 Corporate priority)—Lack of younger adults responsible for total Company volume trend." It indicated that RJR's "[m]arketing department [was] refocusing efforts against younger adult smokers." The report indicated the importance of unrestricted advertising for reaching these younger smokers and stated that a possible advertising ban "would severely limit RJR's ability to introduce [a] new brand or attract younger adult smokers." The report also stated that "[y]ounger adult smokers drive the growth of two major competitors"—Marlboro and Newport—which were "capturing an ever increasing share of younger adult smokers." Finally, the report explained that young smokers were crucial to the continuing survival of RJR because

teenagers remain loyal to their brand of choice as they age and because teenagers smoke an increasing volume of cigarettes as they become adults: "[Y]ounger adult smokers are the key to future growth for any company or brand for several reasons: (1) Aging explains 75% of SOM [Share of Market] growth. (2) Benefits of younger adult smokers compound over time as a result of brand loyalty and the increase in rate per day as smokers age." In summary, the report stated, "RJR must begin now to capture younger adult smokers:—Volume decline inevitable without YAS—Potential for future advertising restrictions—Marketing department restructured to address the issue." 506664499-4558 at 4499-4500, 4506-4507, 4557 (U.S. 20763) (emphasis in original).

2643. Marketing reports prepared for RJR, under the heading "Decision to Smoke," included the following statement: "66% of all new smokers by age 18." The document also reported on the brand loyalty of smokers, indicating that "90% [of] smokers use only one brand," and that the "Implications for 90's" are that eighteen to twenty-four year olds will be "[c]ritical to long term brand vitality as consumption increases with age." Another report prepared for RJR, from approximately 1989, titled "Younger Adult Smokers," discussed the strategic importance of younger adult smokers, stating that "YAS are the only source of replacement smokers-[l]ess than one-third of smokers start after age 18." The report analyzed the differences between "FUBYAS" [First Brand Young Adult Smokers] (ages 18 to 20) and "Switchers" (ages 21 to 24), stating that "FUBYAS are in transition—belonging to the FAMILY (secure) replaced by belonging to selected PEER GROUP (not as secure)." MBDOJ06953-6966 at 6955-6956, 6969, 6993, 6996 (U.S. 59747) (emphasis in original).

2644. In a letter dated October 12, 1989, titled "Dollar Value of YAS Over Time," Burrows provided "estimates . . . of the value of capturing Younger Adult Smokers and holding them over time." The letter calculated the profits that RJR would gain "[i]f an 18 year old adopts an RJR full price brand" for 3 years ($1,359), for 7 years ($3,710), for 10 years ($6,148), or for over 20 years ($18,794). Burrows concluded:

> Our aggressive Plan calls for gains of about 5.5 share points of smokers 18-20 per year, 1990-93 (about 120,000 smokers per year). Achieving this goal would produce an incremental cash contribution of only about $442MM during the Plan period (excluding promotion response in other age groups and other side benefits). However, if we hold these YAS for the market average of 7 years, they would be worth over $2.1 billion in aggregate incremental profit. I certainly agree with you that this payout should be worth a decent sized investment.

507181261-1261 (U.S. 20007) (emphasis in original).

2645. An RJR document, titled "1990 Workplan Objectives," stated that "[t]he number one priority for 1990 is to obtain younger adult smoker trial and grow younger adult smoker share of market." In addition, the document asked "Why target the YAS market?" and answered:

> Each Year:
>
> —800,000 new smokers (18+) enter the market
>
> —1,500,000 smokers leave the market
>
> With about 50 million smokers, this means that each year there are:

> —1.6 share points of new smokers
>
> —3.0 share points of quitters
>
> At least 95% of all new smokers are 18-24. About 70% are exactly 18 (i.e., aged in the 18+ market).
>
> Each brand and company has a share of new smokers and quitters, which is reflected in their shares of YAS and older smokers. These shares drive long-term market performance.

513869196-9303 at 9197, 9198 (U.S. 30058) (emphasis in original).

2646. Carl Schoenbachler, current president and CEO of BATIC (a former parent of B & W Tobacco and holding entity for B & W Tobacco), when asked if the statement, "The key to sustainable long-term profit growth in the U.S. is ASU 30," was accurate, responded: "Yes, I would say that's true." He explained that

> there tends to be a great deal of loyalty in cigarette brands. So, just a natural mathematical equation would suggest if you—if you don't have thirty-year-olds smoking your product, you won't have forty-year-olds and fifty-year-olds. It's a very brand loyal business.

Schoenbachler PD, *United States v. Philip Morris*, 5/21/02, 72:16-21, 73:13-22, 141:11-141:21, 152:20-25.

3. Defendants' Marketing Is a Substantial Contributing Factor to Youth Smoking Initiation

2647. Cigarette marketing, which includes both advertising and promotion, is designed to play a key role in the process of recruiting young, new smokers by exposing young people to massive amounts of imagery as-

sociating positive qualities with cigarette smoking. Research in psychology and cognitive neuroscience demonstrates how powerful such imagery can be, particularly for young people, in suppressing perception of risk and encouraging behavior. Slovic WD, 53:22-63:11 Defendants' own statistics demonstrate how successful they have been in marketing their three main youth brands: Philip Morris's Marlboro, RJR's Camel, and Lorillard's Newport.

* * * * *

8. Conclusions

3296. The evidence is clear and convincing—and beyond any reasonable doubt—that Defendants have marketed to young people twenty-one and under while consistently, publicly, and falsely, denying they do so. Dolan WD, 24:3-16; Krugman WD, 17:2-19:1; Chaloupka WD, 30:832:20; Biglan WD, 100-379.

3297. In response to the mountain of evidence to the contrary, Defendants claim that all the billions of dollars they have spent on cigarette marketing serves the primary purpose of retaining loyal customers ("brand loyalty"), and the secondary purpose of encouraging smokers to switch brands. They deny that any of their marketing efforts are aimed at encouraging young people to initiate smoking or to continue smoking. Dolan WD, 61:6-16.

3298. In fact, the overwhelming evidence set forth in this Section—both Defendants' internal documents, testimony from extraordinarily qualified and experienced experts called by the United States, and the many pictorial and demonstrative exhibits used by the Government—prove that, historically, as well as cur-

rently, Defendants do market to young people, including those under twenty-one, as well as those under eighteen. Defendants' marketing activities are intended to bring new, young, and hopefully long-lived smokers into the market in order to replace those who die (largely from tobacco-caused illnesses) or quit. Defendants intensively researched and tracked young people's attitudes, preferences, and habits. As a result of those investigations, Defendants knew that youth were highly susceptible to marketing and advertising appeals, would underestimate the health risks and effects of smoking, would overestimate their ability to stop smoking, and were price sensitive. Defendants used their knowledge of young people to create highly sophisticated and appealing marketing campaigns targeted to lure them into starting smoking and later becoming nicotine addicts. Dolan WD, 24:3-16; Krugman WD, 84:1-99:23; Chaloupka WD, 30:8-32:20; Biglan WD, 100-379.

3299. As a result, 88% of youth smokers buy the three most heavily advertised brands-Marlboro, Camel, and Newport. Fewer than half of smokers over the age of twenty-five purchase these three brands. For example, in 2003, Marlboro, the most heavily marketed brand, held 49.2% of the twelve to seventeen year old market but only 38% of smokers over age twenty-five. Eriksen WD, 52:17-54:10; (no bates) (U.S. 17684A).

3300. Independent scientific studies published in prestigious peer-reviewed scientific journals and in official government reports have confirmed Defendants' knowledge, as demonstrated in their internal documents, that their marketing contributes substantially to the initial demand for and continuing use of cigarettes by young people. Over the past ten years, there have

been a number of comprehensive reviews of the scientific evidence concerning the effects of cigarette marketing, including advertising and promotion, on smoking decisions by young people. The weight of all available evidence, including survey data, scientific studies and experiments, reports of public health and governmental bodies, and the testimony of experts in this case, supports the conclusion that cigarette marketing is a substantial contributing factor to youth smoking initiation and continuation. Eriksen WD, 55:4-20.

3301. Defendants spent billions of dollars every year on their marketing activities in order to encourage young people to try and then continue purchasing their cigarette products in order to provide the replacement smokers they need to survive. Defendants' expenditures on cigarette advertising and promotion have increased dramatically over the past decades, and in particular since the signing of the MSA. Krugman WD, 23:10-24:4. Over the decades, Defendants have used the full range of marketing tools available to them at any particular time, including: advertising on television, radio, and billboards, and in magazines and newspapers; sponsoring events, such as sporting events, bar promotions, festivals, concerts, and contests; providing coupons, price reductions, and free packs with purchases; providing gifts with purchases (known as "continuity items") such as t-shirts, mugs, and sporting goods; direct-mail marketing by sending magazines and other materials directly to individuals' homes; distributing free cigarette samples at retail stores, public events, bars, or other locations; and strategically locating "point of sale" advertising and promotions at retail outlets young people are most likely to frequent, such as convenience stores. Krugman WD, 43:14-2; Dolan WD, 48:6-3.

3302. In the face of this evidence, Defendants have denied, over and over, with great self-righteousness, that they have marketed to youth.

G. Defendants Have Publicly Denied What They Internally Acknowledged: that ETS Is Hazardous to Nonsmokers

1. Introduction

3303. Defendants' collective effort to maintain an open question as to the health effects of cigarette smoking was not limited to whether cigarettes caused disease in smokers themselves. During the 1970s, scientific evidence suggesting that exposure to cigarette smoke was hazardous to nonsmokers began to grow, and public health authorities began to warn of a potential health risk to both adults and children. Fearing government regulation to restrict smoking in public places and sensing a decrease in the social acceptability of smoking, Defendants were faced with a major threat to their profits.

3304. In 1974, Tobacco Institute chairman Horace Kornegay warned that smoking restrictions not only impacted sales but also "could lead to the virtual elimination of cigarette smoking." TIMN0067732-7755 at 7734 (U.S. 22047). Reynolds CEO Ed Horrigan wrote Lorillard executives in 1982: "We all know that probably the biggest threat to our industry is the issue of passive smoking." 93443843-3843 (U.S. 32289). A 1986 BATCo document stated: "The world tobacco industry sees the ETS issue as the most serious threat to our whole business." 1009931583165 at 3158 (U.S. 89556). Philip Morris Companies Vice Chairman Bill Murray was advised at a presentation by Project Down under

Conference attendees, in 1987: "The situation can't get any worse. Sales are down, can't be attributed to taxes or price increases. ETS is the link between smokers and non-smokers and is, thus, the anti's [anti-smoking activists] silver bullet." 20215026712678 at 2678 (U.S. 22950).

3305. In response, Defendants crafted and implemented a broad strategy to undermine and distort the evidence indicting passive smoke as a health hazard. Defendants' initiatives and public statements with respect to passive smoking attempted to deceive the public, distort the scientific record, avoid adverse findings by government agencies, and forestall indoor air restrictions. Defendants' conduct with respect to passive smoking continues to this day, when currently no Defendant publicly admits that passive exposure to cigarette smoke causes disease or other adverse health effects.

* * * * *

9. Conclusions

3859. Scientists have been concerned about the health effects of environmental tobacco smoke since at least the late 1960s, after the issuance of the Surgeon General's Report on Smoking and Health. However, no scientific consensus about the hazards of ETS to nonsmokers (particularly to babies and young children), as well as to smokers who also inhale the sidestream smoke which is a component of ETS, was reached until 1986. That year the Surgeon General issued his Report concluding that ETS is a cause of disease and that children of smoking parents have a higher frequency of respiratory infections and symptoms; the National Research Council of the National Academy of Sciences issued its report on "Environmental Tobacco Smoke, Measuring

Exposures and Assessing Health Effects," concluding that ETS increases the incidence of lung cancer in nonsmokers and that children of smoking parents suffer greater respiratory problems; and the World Health Organization's International Agency for Research on Cancer (IARC) issued its Monograph concluding that tobacco smoke is carcinogenic to humans.

3860. Significantly, Defendants were well aware of, and worried about, this issue as early as 1961 when a Philip Morris scientist presented a paper showing that 84% of cigarette smoke was composed of sidestream smoke, and that sidestream smoke contained carcinogens. In addition to understanding, early on, that there was a strong possibility that ETS posed a serious health danger to smokers, Defendants also understood the financial ramifications of such a conclusion. In 1974, the Tobacco Institute's president Horace Kornegay acknowledged that indoor air restrictions designed to defuse the passive smoking issue "could lead to the virtual elimination of cigarette smoking." In 1980, the CEO of R.J. Reynolds, Ed Horrigan, stated that "We all know that probably the biggest threat to our industry is the issue of passive smoking." In the 1990s, a Philip Morris report identified "the social acceptability of smoking practices [as] the most critical issue that our industry is facing today . . . Attacks on acceptability are almost exclusively based on claims that ETS can cause diseases in the exposed population."

3861. Despite the fact that Defendants' own scientists were increasingly persuaded of the strength of the research showing the dangers of ETS to nonsmokers, Defendants mounted a comprehensive, coordinated, international effort to undermine and discredit this re-

search. Defendants poured money and resources into establishing a network of interlocking organizations. They identified, trained, and subsidized "friendly" scientists through their Global Consultancy Program, and sponsored symposia all over the world from Vienna to Tokyo to Bermuda to Canada featuring those "friendly" scientists, without revealing their substantial financial ties to Defendants. They conducted a mammoth national and international public relations campaign to criticize and trivialize scientific reports demonstrating the health hazards of ETS to nonsmokers and smokers.

3862. Defendants still continue to deny the full extent to which ETS can harm nonsmokers and smokers. Some Defendants, such as BATCo, R.J. Reynolds, and Lorillard, flatly deny that secondhand smoke causes disease and other adverse health effects; some, such as Brown & Williamson, claim it's still "an open question"; and others, such as Philip Morris, say that they don't take a position and that the public should follow the recommendations of the public health authorities. To this day, no Defendant fully acknowledges that the danger exists.

H. At Various Times, Defendants Attempted to and Did Suppress and Conceal Scientific Research and Destroy Documents Relevant to Their Public and Litigation Positions

3863. Defendants attempted to and, at times, did prevent/stop ongoing research, hide existing research, and destroy sensitive documents in order to protect their public positions on smoking and health, avoid or limit liability for smoking and health related claims in litigation, and prevent regulatory limitations on the cigarette industry.

3864. The evidence of Defendants' suppression of research and destruction of documents consists of events which often seem to be unrelated and to lack a unifying thread. Defendants claim these facts, most of which are undisputed, amount to no more than a string of isolated instances which prove nothing. This explanation misses the point. The evidence is clear that on a significant number of occasions, Defendants did in fact suppress research and destroy documents to protect themselves and the industry. The fact that much additional evidence may be lacking because Defendants were successful in their efforts to suppress, conceal, and destroy materials that would have reflected adversely on their corporate interests is hardly a justification for ignoring the evidence that does exist. Moreover, in those instances where Defendants did successfully suppress, conceal, and destroy materials, it is most unlikely that there would be any evidence to reflect that since it would no longer exist. By destroying evidence, Defendants make it virtually impossible to know what materials existed prior to their destruction.

* * * * *

4. Conclusions

4034. The foregoing Findings of Fact demonstrate that, over the course of approximately fifty years, different Defendants, at different times, took the following actions in order to maintain their public positions on smoking and disease-related issues, nicotine addiction, nicotine manipulation, and low tar cigarettes, in order to protect themselves from smoking and health related claims in litigation, and in order to avoid regulation which they viewed as harmful: they suppressed, concealed, and terminated scientific research; they de-

stroyed documents including scientific reports and studies; and they repeatedly and intentionally improperly asserted the attorney-client and work product privileges over many thousands of documents (not just pages) to thwart disclosure to plaintiffs in smoking and health related litigation and to federal regulatory agencies, and to shield those documents from the harsh light of day.

4035. While it is true that some of these efforts were unsuccessful and some of the elaborate document "retention" policies were either not fully implemented or not implemented at all, the fact remains that many were fully complied with. Consequently, we can never know the full extent of the evidence destroyed and lost to public view.

VI. THE PROVISIONS AND IMPLICATIONS OF SETTLEMENT AGREEMENTS BY DEFENDANTS

* * * * *

CONCLUSIONS OF LAW

VII. DEFENDANTS HAVE VIOLATED 18 U.S.C. 1962(c)

A. Introduction

The United States established by a preponderance of the evidence that Defendants and others comprised an association-in-fact enterprise ("Enterprise") and that each Defendant participated in the conduct, management, and operation of the Enterprise through a pattern of racketeering activity in violation of 18 U.S.C. § 1962(c); *see, e.g., Sedima v. Imrex Co.*, 473 U.S. 479, 491, 105 S. Ct. 3275, 87 L. Ed. 2d 346 (1985); *Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union 639*, 913 F.2d 948, 954 (D.C. Cir. 1990); *United*

States v. Local 560, Int'l Bhd. of Teamsters, 780 F.2d 267, 280 n.12 (3d Cir. 1985). Section 1962(c) provides:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. § 1962(c). The United States has proven this violation by establishing each of the following elements:

- The existence of an enterprise;
- The enterprise was engaged in, or its activities affected, interstate or foreign commerce;
- Each defendant was employed by or associated with the enterprise;
- Each defendant conducted or participated, directly or indirectly, in the conduct of the affairs of the enterprise;
- Each defendant committed at least two acts of racketeering within 10 years of one another; and
- The racketeering acts constitute a pattern of racketeering activity.

See, e.g., Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496-97, 105 S. Ct. 3275, 87 L. Ed. 2d 346 (1985); *United States v. Hoyle*, 122 F.3d 48, 50 (D.C. Cir. 1997) (listing elements); *United States v. Philip Morris USA*, 316 F. Supp. 2d 13, 16 (D.D.C. 2004).

All the alleged predicate racketeering acts in this case involve mail or wire fraud offenses, in violation of 18 U.S.C. § 1341 or § 1343. The mail fraud statute, 18 U.S.C. § 1341, provides in relevant part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises . . . for the purpose of executing such scheme or artifice or attempting so to do, [mails or causes the mailing of any matter] . . . shall be fined under this title or imprisoned not more than 20 years, or both.

To establish an offense under § 1341 (or § 1343), the plaintiff must prove by a preponderance of evidence the following elements:

- The defendant knowingly devised or intended to devise any scheme or artifice to defraud a victim of money or property, or the defendant knowingly devised or intended to devise any scheme for obtaining money or property by means of material false or fraudulent, representations, pretenses, or promises, and
- The defendant mailed any matter, or caused the mailing of any matter (or sent or caused to be send by interstate wire transmission), for the purpose of furthering or executing such scheme or artifice, and
- The defendant acted with the specific intent to defraud or deceive.

See Neder v. United States, 527 U.S. 1, 24-25, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999); *United States v.*

Philip Morris Inc., 304 F. Supp. 2d 60, 69 (D.D.C. 2004). The extensive, detailed Findings of Fact set forth above, establish—overwhelmingly—that Defendants devised a scheme to defraud and used mailings and wire transmissions for the purpose of furthering it. The purpose of the scheme was to obtain, from smokers and potential smokers, money, i.e., the cost of cigarettes, to fill the coffers of the corporate Defendants. Put more colloquially, and less legalistically, over the course of more than 50 years, Defendants lied, misrepresented, and deceived the American public, including smokers and the young people they avidly sought as "replacement smokers," about the devastating health effects of smoking and environmental tobacco smoke, they suppressed research, they destroyed documents, they manipulated the use of nicotine so as to increase and perpetuate addiction, they distorted the truth about low tar and light cigarettes so as to discourage smokers from quitting, and they abused the legal system in order to achieve their goal—to make money with little, if any, regard for individual illness and suffering, soaring health costs, or the integrity of the legal system.

* * * * *

VIII. DEFENDANTS HAVE VIOLATED 18 U.S.C. § 1962(d)

18 U.S.C. § 1962(d) provides in part: "It shall be unlawful for any person to conspire to violate any of the provisions of . . . Subsection (c) of this Section."

A. Applicable Case Law

To establish a conspiracy violation of 18 U.S.C. § 1962(d), the United States must prove each of the following elements:

1. The existence of an enterprise;
2. That the enterprise was engaged in, or its activities affected, interstate or foreign commerce; and
3. That each defendant knowingly agreed to the commission of a violation of 18 U.S.C.1962(c).[74]

See, e.g., Salinas v. United States, 522 U.S. 52, 62-65, 118 S. Ct. 469, 139 L. Ed. 2d 352 (1997); *United States v. Philip Morris Inc.*, 130 F. Supp. 2d 96, 100 (D.D.C. 2001); *United States v. Posada-Rios*, 158 F.3d 832, 857 (5th Cir. 1998); *United States v. To*, 144 F.3d 737, 744 (11th Cir. 1998); *Jones v. Meridian Towers Apartments, Inc.*, 816 F. Supp. 762, 772-73 (D.D.C. 1993).

Although a substantive RICO offense under § 1962(c), requires proof that each defendant committed at least two racketeering acts, a RICO conspiracy charge does not require proof of the actual commission of any racketeering act or any overt act. *See, e.g., Salinas*, 522 U.S. at 63, 118 S. Ct. 469; *United States v. Zauber*, 857 F.2d 137, 148 (3d Cir. 1988); *United States v. Caporale*, 806 F.2d 1487, 1515 (11th Cir. 1986); *United States v. Teitler*, 802 F.2d 606, 612-13 (2d Cir. 1986) (collecting cases); *United States v. Neapolitan*, 791 F.2d 489, 498 (7th Cir. 1986); *United States v. Adams*, 759 F.2d 1099, 1116 (3d Cir. 1985); *United States v. Brooklier*, 685 F.2d 1208, 1222-23 (9th Cir. 1982); *United States v. Corrado*, 286 F.3d 934, 937 (6th Cir. 2002); *Glecier*, 923 F.2d at 500; *Gonzalez*, 921 F.2d at 1547-48; *United States v. Torres Lopez*, 851 F.2d 520, 525 (1st

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[74] The first two elements are also required to establish the substantive RICO violation, which has been addressed *supra*, in Sections VII(C) and (D).

Cir. 1988); *United States v. Persico*, 832 F.2d 705, 713 (2d Cir. 1987).

As the Supreme Court explained in *Salinas*, "[t]he RICO conspiracy provision, then, is even more comprehensive than the general conspiracy offense in [18 U.S.C.] § 371." 522 U.S. at 63, 118 S. Ct. 469. As in the case of conventional conspiracy offenses, each co-conspirator is liable for the acts of all other conspirators undertaken in furtherance of the conspiracy both prior to and subsequent to the coconspirator's joining the conspiracy. *See, e.g., Salinas*, 522 U.S. at 63-64, 118 S. Ct. 469; *P & B Autobody*, 43 F.3d at 1562; *Pungitore*, 910 F.2d at 1145-48; *United States v. Bridgeman*, 523 F.2d 1099, 1108 (D.C. Cir. 1975).

* * * * *

B. Each Defendant[75] Is Liable for the RICO Conspiracy Charge Because Each Entered into the Requisite Conspiratorial Agreement

"In order to be guilty of a RICO conspiracy, a defendant must either agree to [individually] commit two predicate acts or agree to participate in the conduct of the enterprise with the knowledge and intent that other members of the conspiracy would commit at least two predicate acts in furtherance of the enterprise." *United States v. Nguyen*, 255 F.3d 1335, 1341 (11th Cir. 2001); *see also United States v. Abbell*, 271 F.3d 1286, 1299 (11th Cir. 2001); *Brouwer v. Raffensperger, Hughes & Co.*, 199 F.3d 961, 964 (7th Cir. 2000); *To*, 144 F.3d at

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[75] As discussed in great detail, *infra* at Section VIII(C), Liggett withdrew from the conspiracy in 1997. Accordingly, Liggett is not liable as a conspirator for any acts that occurred subsequent to 1997.

744; *United States v. Brazel*, 102 F.3d 1120, 1138 (11th Cir. 1997); *United States v. Shenberg*, 89 F.3d 1461, 1471 (11th Cir. 1996). Defendants are liable for a RICO conspiracy under either test.

First, each Defendant individually agreed to commit at least two Racketeering Acts. The overwhelming evidence demonstrates that each Defendant personally committed numerous Racketeering Acts in furtherance of the affairs of the Enterprise. *See* Findings of Fact Section VII(G)(3)(a), *supra*. "Where, as here, the evidence establishes that each defendant, over a period of years, committed several acts of racketeering activity in furtherance of the enterprise's affairs, the inference of an agreement to do so is unmistakable." *Elliott*, 571 F.2d at 903; *see also United States v. Ashman*, 979 F.2d 469, 492 (7th Cir. 1992); *United States v. Crockett*, 979 F.2d 1204, 1218 (7th Cir. 1991); *United States v. Carlock*, 806 F.2d at 547 (5th Cir. 1986); *United States v. Melton*, 689 F.2d 679, 683 (7th Cir. 1982); *United States v. Sutherland*, 656 F.2d 1181, 1187 n.4 (5th Cir. 1981).

Second, each Defendant agreed to participate in the conduct of the Enterprise with the knowledge and intent that other members of the conspiracy would also commit at least two predicate acts in furtherance of the Enterprise. A RICO conspiracy may exist even if a conspirator does not agree to commit or facilitate each and every part of the substantive offense. *See United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 253-254, 60 S. Ct. 811, 84 L. Ed. 1129 (1940). As the Supreme Court explained in reference to RICO:

> A conspirator must intend to further an endeavor which, if completed, would satisfy all of the elements

> of a substantive criminal offense, but it suffices that he adopt the goal of furthering or facilitating the criminal endeavor. He may do so in any number of ways short of agreeing to undertake all of the acts necessary for the crime's completion. One can be a conspirator by agreeing to facilitate only some of the acts leading to the substantive offense. It is elementary that a conspiracy may exist and be punished whether or not the substantive crime ensues. . . .
>
> * * *
>
> It makes no difference that the substantive offense under § 1962(c) requires two or more predicate acts. The interplay between subsections (c) and (d) does not permit us to excuse from the reach of the conspiracy provision an actor who does not himself commit or agree to commit the two or more predicate acts requisite to the underlying offense.

Salinas, 522 U.S. at 63-65, 118 S. Ct. 469.

> Thus, to prove a RICO conspiracy,
>
> [t]he focus is on the agreement to participate in the enterprise through the pattern of racketeering activity, not on the agreement to commit the individual predicate acts. . . . The government can prove [such] an agreement on an overall objective by circumstantial evidence showing that each defendant must necessarily have known that others were also conspiring to participate in the same enterprise through a pattern of racketeering activity.

Starrett, 55 F.3d at 1543-44 (internal quotations and citations omitted); *Accord Posada-Rios*, 158 F.3d at 857; *To*, 144 F.3d at 744. It is sufficient "that the defendant

agree to the commission of [at least] two predicate acts [by any conspirator] on behalf of the conspiracy." *MCM Partners, Inc. v. Andrews-Bartlett & Assocs.*, 62 F.3d 967, 980 (7th Cir. 1995) (quoting *United States v. Neapolitan*, 791 F.2d 489, 498 (7th Cir. 1986)). *Accord Brouwer*, 199 F.3d at 964; *United States v. Quintanilla*, 2 F.3d 1469, 1484 (7th Cir. 1993) (*quoting Neapolitan*).

Defendants' conspiracy was in existence as of December 1953, when several of the cigarette company Defendants met in New York City to create CTR and to discuss and outline the Enterprise's future strategy.[76] Each Defendant agreed to commit a substantive RICO offense with the knowledge that other members of the Enterprise were also conspiring to commit racketeering activity. All Defendants coordinated significant aspects of their public relations, scientific, legal, and marketing activity in furtherance of the shared objective—to use mail and wire transmissions to maximize industry profits by preserving and expanding the market for cigarettes through a scheme to deceive the public. Defendants executed the scheme by using several different strategies including: (1) denying that there were adverse health effects from smoking; (2) making false, misleading, and deceptive public statements designed to maintain doubt about whether smoking and exposure to secondhand smoke cause disease; (3) denying the addictiveness of smoking cigarettes and the role of nicotine therein; (4) disseminating advertising for light and low tar cigarettes suggesting they were less harmful than full flavor ones; and (5) undertaking a publicly announced duty to conduct and publicize disinterested and

[76] As noted earlier, no evidence has been presented regarding a conspiracy before 1953.

independent research into the health effects of smoking upon which the public could rely. *See* Findings of Fact Sections III and V.

Moreover, the cigarette company Defendants jointly participated at various times and to various degrees in creating, funding, directing and controlling Defendants CTR, TI and other entities and causing Defendants CTR and TI to commit numerous racketeering acts to further those shared objectives. Furthermore, the frequent oral and written communications between and among Defendants illustrate their joint efforts to pursue their shared objectives. Significantly, Defendants worked together continuously, in many different venues and through many different entities, to disseminate their agreed upon deceptive public position denying the link between smoking cigarettes and adverse health effects, denying the addictiveness of smoking cigarettes and nicotine, and denying their marketing of cigarettes to young people. *See* Findings of Fact Sections V(A, B, F).

In addition, each Defendant also agreed to facilitate the substantive RICO violation by concealing or suppressing information and documents which may have been detrimental to the interests of the members of the Enterprise. Such information might well have been discoverable in smoking and health liability cases against Defendants and therefore could have constituted, or led to, evidence of the link between smoking cigarettes, addiction, and adverse health effects. *See* Findings of Fact Section V(H).

Thus, each Defendant knew the goals of the Enterprise, the general nature of the conspiracy, and that other members of the conspiracy would commit at least two Racketeering Acts in furtherance of the Enter-

prise's scheme to defraud. Indeed, each Defendant took substantial steps to facilitate the scheme to defraud that was the central purpose of the conspiracy, including committing numerous Racketeering Acts in furtherance of the Enterprise's affairs. Hence, each Defendant entered into the requisite conspiratorial agreement. *Accord Salinas*, 522 U.S. at 66, 118 S. Ct. 469 ("[E]ven if Salinas did not accept or agree to accept two bribes, there was ample evidence that he conspired to violate subsection (c). The evidence showed that [Salinas' conspirator] committed at least two acts of racketeering activity when he accepted numerous bribes and that Salinas knew about and agreed to facilitate the scheme. This is sufficient to support a conviction under § 1962(d).").

While there is much explicit evidence of actual agreement between Defendants in the Findings of Fact, RICO liability does not require such an explicit agreement. "Regardless of the method used to prove the agreement, the government does not have to establish that each conspirator explicitly agreed with every other conspirator to commit the substantive RICO crime described in the indictment, or knew his fellow conspirators, or was aware of all the details of the conspiracy." *Starrett*, 55 F.3d at 1544 (internal quotations and citations deleted).

Even though the criminal activities may differ, they must still be linked to allow the inference of an agreement. *United States v. Boylan*, 898 F.2d 230, 242 (1st Cir. 1990) (RICO conspiracy conviction upheld where "the defendants and their activities were nothing short of striking: each defendant was a detective assigned to work nights in District 4 at some time during the indictment period; each received things of value, usually cash,

from restaurant or nightclub owners in exchange for services not officially sanctioned; the targeted establishments were all in District 4 and all under the Board's aegis. Moreover, there was a significant degree of interconnectedness. The defendants often cooperated with one another in collecting payments and in providing their specialized services. These common characteristics are precisely the kind of factors which can permissibly lead to the inference of a single conspiracy."); *Ashman*, 979 F.2d at 492 (in investment scheme, evidence sufficient for RICO conspiracy where defendants served as "bag men" for each other, used similar procedures for covering losses, and "were well aware that they were part of an ongoing and flexible agreement to commit fraud as the need—or perhaps the opportunity—arose"); *see also United States v. Zichettello*, 208 F.3d 72, 100 (2d Cir. 2000); *To*, 144 F.3d at 744; *United States v. Ruiz*, 905 F.2d 499, 505 (1st Cir. 1990); *Rastelli*, 870 F.2d at 828 (collecting cases); *United States v. Rosenthal*, 793 F.2d 1214, 906 1228 (11th Cir. 1986); *United States v. De Peri*, 778 F.2d 963, 975 (3d Cir. 1985); *Elliott*, 571 F.2d at 902-03.

To establish sufficient knowledge, it is only required that the defendant "know the general nature of the conspiracy and that the conspiracy extends beyond his individual role." *Rastelli*, 870 F.2d at 828 (collecting cases). *Accord Zichettello*, 208 F.3d at 100; *Brazel*, 102 F.3d at 1138; *Eufrasio*, 935 F.2d at 577 n.29; *Rosenthal*, 793 F.2d at 1228; *De Peri*, 778 F.2d at 975; *Elliott*, 571 F.2d at 903-04. Furthermore, "[b]ecause conspirators normally attempt to conceal their conduct, the elements of a conspiracy offense may be established solely by circumstantial evidence. . . . The agreement, a defendant's guilty knowledge and a defendant's participation

in the conspiracy all may be inferred from the development and collocation of circumstances." *Posada-Rios*, 158 F.3d at 857 (citations and internal quotations omitted).

For all the foregoing reasons, the Court concludes that Defendants are liable for conspiracy under 18 U.S.C. § 1962(d) of RICO because they both explicitly and implicitly agreed to violate 18 U.S.C. § 1962(c) of RICO.[77]

C. Liggett Withdrew from the Conspiracy

Where an alleged conspirator communicates his abandonment in a manner reasonably calculated to reach co-conspirators, the conspirator is deemed to have withdrawn from the conspiracy. *United States v. Thomas*, 114 F.3d 228, 267-9 (D.C. Cir.), *cert. denied*, 522 U.S. 1033, 118 S. Ct. 635, 139 L. Ed. 2d 614 (1997) (collecting cases); *see also United States v. United States Gypsum Co.*, 438 U.S. 422, 463-64, 98 S. Ct. 2864, 57 L. Ed. 2d 854 (1978); *In re Brand Name Prescription*

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[77] Contrary to Altria's claim, the prohibition against intracorporate conspiracies under the antitrust laws does not apply to this case. In *Ashland Oil, Inc. v. Arnett*, 875 F.2d 1271 (7th Cir. 1989), the Seventh Circuit explained:

> Since a subsidiary and its parent theoretically have a community of interest, a conspiracy "in restraint of trade" between them poses no threat to the goals of antitrust law—protecting competition. In contrast, intracorporate conspiracies do threaten RICO's goals of preventing the infiltration of legitimate businesses by racketeers and separating racketeers from their profits. (continued . . .)

875 F.2d at 1281 (citations omitted). Accordingly, because Altria conspired to violate 18 U.S.C. § 1962(c), it is liable under RICO conspiracy, even though one of the Defendants with which Altria conspired was Philip Morris USA, Altria's subsidiary.

Drugs Antitrust Litig., 123 F.3d 599, 616 (7th Cir. 1978); *In re Corrugated Container Antitrust Litig.*, 662 F.2d 875, 886 (D.C. Cir. 1981). Although there is clear and convincing evidence that Liggett participated in the RICO Enterprise and conspiracy during its formative years, the Court finds that it withdrew from the conspiracy in 1997.

* * * * *

IX. ALTRIA IS LIABLE FOR ITS VIOLATIONS OF 18 U.S.C. § 1962(c) AND (d).

* * * * *

X. THERE IS A LIKELIHOOD OF PRESENT AND FUTURE VIOLATIONS OF RICO

A. Applicable Law

18 U.S.C. § 1964(a) limits the granting of remedies for liability under 1962(c) to those which "prevent and restrain violations of section 1962. . . . " As the D.C. Circuit explained, "[t]his language indicates that the jurisdiction is limited to forward-looking remedies that are aimed at future violations." *United States v. Philip Morris USA Inc.*, 396 F.3d 1190, 1198 (D.C. Cir. 2005).

This Court has already held that:

> To obtain injunctive relief in this Circuit, a plaintiff must show that the defendant's past unlawful conduct indicates a "'reasonable likelihood of further violation(s) in the future.'" *SEC v. Kenton Capital, Ltd.*, 69 F. Supp. 2d 1, 15 (D.D.C. 1998) (Kollar-Kotelly, J.) (quoting *SEC v. Savoy Ind., Inc.*, 587 F.2d 1149, 1168 (D.C. Cir. 1978)); *SEC v. Bilzerian*, 29 F.3d 689, 695 (D.C. Cir. 1994).

> To determine whether there is a "reasonable likelihood" of future violations, the following factors must be considered: "[1] whether a defendant's violation was isolated or part of a pattern, [2] whether the violation was flagrant and deliberate or merely technical in nature, and [3] whether the defendant's business will present opportunities to violate the law in the future." [*SEC v. First City Financial Corp.*, 890 F.2d 1215, 1228 (D.C. Cir. 1989)] (citing *Savoy Indus.*, 587 F.2d at 1168); *Bilzerian*, 29 F.3d at 695. None of these three factors is determinative; rather, "the district court should determine the propensity for future violations based on the totality of circumstances." *First City*, 890 F.2d at 1228 (citing *SEC v. Youmans*, 729 F.2d 413, 415 (6th Cir. 1984)).

Philip Morris, Inc., 116 F. Supp. 2d at 148. In addition, the requisite "reasonable likelihood" of future violations may be established by inferences drawn from past conduct alone. *Philip Morris USA*, 316 F. Supp. 2d at 10 n.3.

The Findings of Fact demonstrate that Defendants' conduct "overwhelmingly satisfied each of the [D.C. Circuit's] three *First City* factors." *First City*, 890 F.2d at 1228. First, Defendants' RICO violations were not "isolated." On the contrary, the Findings of Fact describes more than 100 predicate acts spanning more than a half century. Second, Defendants' RICO violations were not "technical in nature." As discussed above, Defendants' numerous misstatements and acts of concealment and deception were made intentionally and deliberately, rather than accidentally or negligently, as part of a multi-faceted, sophisticated scheme to defraud. Third, as this Court has already found, Defendants' business of manufacturing, selling and marketing tobacco products

"present[s] opportunities to violate the law in the future." *Philip Morris*, 116 F. Supp. 2d at 149 (alteration in original). As the Government points out, as long as Defendants are in the business of selling and marketing tobacco products, they will have countless "opportunities" and temptations to take similar unlawful actions in order to maximize their revenues, just as they have done for the past five decades.

Where, as here, the United States seeks equitable relief brought by the United States under 18 U.S.C. § 1964(a), "the government need not, as [Defendants] assert, demonstrate a new RICO violation to justify issuance of the injunction." *Local 560*, 974 F.2d at 325 n.5 ("[Defendant] erroneously argues . . . that to succeed the government must prove a new RICO offense based on conduct which occurred after the March 16, 1984 Judgment Order"); *see also United States v. Local 6A, Cement & Concrete Workers*, 663 F. Supp. 192, 195 (S.D.N.Y. 1986) (rejecting argument that "the Government must show present RICO violations to secure [injunctive] relief"). Instead, it is sufficient that the United States demonstrate a reasonable likelihood that the defendant might continue unlawful conduct in the future, which may be inferred from past conduct.[79] In making that determination, the court does not begin

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[79] *See, e.g., United States v. Private Sanitation Indus. Ass'n*, 995 F.2d 375, 377 (2d Cir. 1993); *United States v. Local 30, United Slate, Tile & Composition Workers*, 871 F.2d 401, 408-09 (3d Cir. 1989); *United States v. Local 1804-1, Int'l Longshoremens Ass'n*, 831 F. Supp. 177, 191 (S.D.N.Y. 1993); *United States v. Local 295, Int'l Bhd. of Teamsters*, 784 F. Supp. 15, 19-22 (E.D.N.Y. 1992) (RICO injunction granted based upon evidence of past corruptions, and the court noted that "[i]nstitutional practices and traditions tend to endure long after specific individuals are gone") (*id.* at 19); *Local 6A*, 663 F. Supp. at 194-95.

"with a clean slate" as if it were "a new case;" rather, the court considers the totality of the evidence of the underlying case. *United States v. Local 560, Int'l Bhd. of Teamsters*, 754 F. Supp. 395, 403 (D.N.J. 1991). Moreover, a defendant remains liable for the continuation of events it conspired to set in motion, even if a particular defendant has ceased its unlawful activity. For the Court to enter injunctive remedies, there need only be a reasonable likelihood that the unlawful conduct set in motion by the conspirators will continue.

The evidence in this case clearly establishes that Defendants have not ceased engaging in unlawful activity. Even after the Complaint in this action was filed in September 1999, Defendants continued to engage in conduct that is materially indistinguishable from their previous actions, activity that continues to this day. For example, most Defendants continue to fraudulently deny the adverse health effects of secondhand smoke which they recognize internally; all Defendants continue to market "low tar" cigarettes to consumers seeking to reduce their health risks or quit; all Defendants continue to fraudulently deny that they manipulate the nicotine delivery of their cigarettes in order to create and sustain addiction; some Defendants continue to deny that they market to youth in publications with significant youth readership and with imagery that targets youth; and some Defendants continue to suppress and conceal information which might undermine their public or litigation positions. *See generally* Findings of Fact Section V. Significantly, their conduct continues to further the objectives of the overarching scheme to defraud, which began by at least 1953. Their continuing conduct misleads consumers in order to maximize Defendants' revenues by recruiting new smokers (the majority of whom

are under the age of 18), preventing current smokers from quitting, and thereby sustaining the industry.

As Defendants' senior executives took the witness stand at trial, one after another, it became exceedingly clear that these Defendants have not, as they claim, ceased their wrongdoing or, as they argued throughout the trial, undertaken fundamental or permanent institutional change. For example, during live testimony in January 2005, more than forty years after the 1964 Surgeon General's Report, Reynolds American Executive Chairman Andrew Schindler refused to admit that smoking causes disease. Schindler TT, 1/24/05, 10812:3-22. Nevertheless, Joint Defendants assert in their post-trial Proposed Findings of Fact that "Reynolds Concedes That Cigarette Smoking Causes Disease." JD FF ch. 8, § V.G.4. In reality, the RJR website on which Joint Defendants rely in making that statement is only a half-hearted concession with the same two conditions that Schindler made in open court: "R.J. Reynolds Tobacco Company (R.J. Reynolds) believes that smoking, in combination with other factors, causes disease in some individuals." March 18, 2005 RJR website printout (page 54 of 569) (JD 068012). The website minimizes smoking as being merely "a risk factor for many chronic diseases," and states that "[m]ost, if not all, chronic diseases result from the interaction of many risk factors including genetics, diet and lifestyle choices." *Id.*[80]

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[80] Schindler acknowledged at trial that "[i]f R.J. Reynolds wanted to convey the message on its Website that smoking causes disease, it could say that unequivocally," and that he could make it happen "in a heartbeat," but he would not do so. Schindler TT, 1/24/05, 10816:2510817:5, 10821:2-18.

RJR is not alone. Lorillard's CEO, Martin Orlowsky, likewise refused at trial to admit to the full extent of smoking's harm. He was asked, "Why hasn't Lorillard specifically stated publicly that smoking causes any diseases other than smoking emphysema, COPD or heart disease?" He responded: "We have—in certain instances, we do not know if in fact the evidence, the scientific evidence is such that it warrants saying it does cause. However, Lorillard's longstanding position, as long as I've been with the company, is that certainly smoking can, and is a risk factor for those diseases." Orlowsky TT, 10/13/04, 2303:7-15. Lorillard's website includes a July 28, 2003 press release, in which its general counsel Ronald Milstein falsely stated that, "Research has shown time and time again that willpower is the only smoking cessation aid that always works." (no bates) (U.S. 86693). At trial, Milstein specifically refused to remove his statement from the website. Milstein TT, 1/7/05, 9288:12-19. He made those statements notwithstanding the fact that Defendants' internal documents indicate that they recognize that it is simply false that "willpower . . . always works." Clearly, then, any claim the Defendants have changed their behavior must be rejected.

B. The Enterprise's Scheme to Defraud Presents Continuing Opportunities for Defendants to Commit Violations of 18 U.S.C.1962(c) and (d)

There is a reasonable likelihood that Defendants' RICO violations will continue in most of the areas in which they have committed violations in the past. Defendants' practices have not materially changed in most of the Enterprise's activities, including: denial that ETS causes disease, denial that Defendants market to youth,

denial of the addictiveness of nicotine, denial of manipulation of the design and content of cigarettes, suppression of information and research, and claims that light and low tar cigarettes are less hazardous than full-flavor cigarettes.

Philip Morris, BATCo, B & W, Lorillard, and RJR all deny in this lawsuit and in public statements that ETS causes disease in nonsmokers, contrary to the definitive scientific evidence and their own internal acknowledgments.[81] As of August 2005, RJR's website asserted that it believes "that there are still legitimate scientific questions concerning the reported risks of secondhand smoke." (U.S. 92012). Absent Court intervention, such denials and distortions of material health information and scientific evidence on ETS are, at a minimum, likely to continue.

Similarly, Defendants continue to engage in many practices which target youth, and deny that they do so. Despite the provisions of the MSA, Defendants continue to track youth behavior and preferences and market to youth using imagery which appeals to the needs and desires of adolescents. Defendants are well aware that

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[81] From 1999-2001, the Philip Morris website publicly stated its disagreement with the scientific consensus as well: Many scientists and regulators have concluded that ETS poses a health risk to nonsmokers. Even though we do not agree with many of their conclusions, below we have provided some links so you can access some of their views. (no bates) (U.S. 92056 at 2); Parrish TT, 11080:23-11082:14. While this case was pending, Philip Morris revised its position on ETS to delete its disagreement with the conclusions of "scientists and regulators." Philip Morris now states: "Public health officials have concluded that secondhand smoke from cigarettes causes disease, including lung cancer and heart disease in nonsmoking adults" as well as a number of adverse health effects in children. (no bates) (U.S. 92055 at 1).

over eighty percent of adult smokers began smoking before the age of 18, and therefore know that securing the youth market is critical to their survival. There is therefore no reason, especially given their long history of denial and deceit, to trust their assurances that they will not continue committing RICO violations denying their marketing to youth.

Although Defendants recently began to finally admit that smoking is addictive, no Defendant publicly informs consumers that nicotine is addictive, much less that smoking is a nicotine-driven addiction. *See* Findings of Fact Section V(B)(4). Defendants minimize the issue as a "quibble over the precise wording of the addictiveness of smoking." JD Br. at 39. To the contrary, the issue is Defendants' refusal to admit publicly that nicotine is physiologically addictive, that smoking is a nicotine-driven addiction, and that, therefore, quitting is not a simple act of willpower. At trial, the General Counsel for Philip Morris, Denise Keane, admitted that the "Smoking is Addictive" statement that Philip Morris removed from cigarette packs after buying three Liggett cigarette brands in 1999 was both correct and material. She also agreed that it is material for people to know that Philip Morris agrees that the nicotine delivered in cigarette smoking is addictive, but it does not say so publicly. Keane TT, 1/18/05, 10458:6-17. The deliberate omission of admittedly material information about nicotine addiction is not a mere "quibble." It is fraudulent, with consequences for those who smoke and those, especially young people, who are considering whether to start smoking. Defendants have thus made clear that, despite their internal research to the contrary, they remain unwilling to admit publicly that nicotine is addic-

tive and that smoking is an addiction driven by nicotine. Such RICO violations are reasonably likely to continue.

Defendants also continue to deny that they manipulate the design and content of cigarettes in order to assure adequate nicotine delivery to create and sustain smokers' addiction. Such RICO violations are reasonably likely to continue.

In addition, Defendants have a continuing interest in suppressing research and information and destroying documents which could prove detrimental to their public and litigation positions. Although it is difficult to prove such suppression or destruction, the Court strongly believes such RICO violations are reasonably likely to continue.

Contrary to their internal documents, Defendants also continue to deny that low tar cigarettes are just as hazardous to smokers as full-flavor cigarettes, in part because of smoker compensation. In 1998, Philip Morris, RJR, B & W, and Lorillard jointly stated to the FTC that compensation was so "weakly documented" that the FTC should not require disclosure warnings to alert consumers, and that they were "unaware of evidence," other than that presented in Monograph 7, 5208421992295 at 2243, 2289 (U.S. 88618), that consumers viewed low-tar cigarettes as safer. Defendants are well aware from their own research that a majority of smokers believe that low-tar cigarettes are healthier, are willing to buy them for precisely that reason, and are willing to sacrifice taste for what they believe to be less harmful cigarettes. Nonetheless, to this day, Defendants still deny that, as Monograph 13 found, low-tar cigarettes are just as dangerous as full-flavor cigarettes. These RICO violations are likely to continue.

Finally, despite Defendants' claims that they have materially altered their management and are now "new" companies, the evidence demonstrates that they have not changed their policies or personnel in any meaningful way. For example, Philip Morris' current top executive staff is composed entirely of veteran employees with an average of fifteen to twenty years of company experience. The assertion that such longstanding, faithful employees will usher in dramatically new corporate policies seems reasonably unlikely.

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D. As to Certain Defendants, There is Not a Reasonable Likelihood of Future Violations of 18 U.S.C. § 1962(c) and (d)

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XI. REMEDIES

A. Legal Standards Governing Remedies

Once RICO liability is established, 18 U.S.C. § 1964(a) states that:

> The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter [18 USCS § 1962] by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign com-

merce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

In Order # 550, the Court denied Defendants' Motion for Partial Summary Judgment Dismissing the Government's Disgorgement Claim and, in doing so, laid out the existing standard for equitable remedies under § 1964(a) which prevent and restrain RICO violations. First, the Court noted that the full scope of a court's equitable jurisdiction must be recognized and applied except where "a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction" or where there is a "clear and valid legislative command" limiting jurisdiction. *Porter v. Warner Holding Co.*, 328 U.S. 395, 398, 66 S. Ct. 1086, 90 L. Ed. 1332 (1946). Second, the Court held that the plain language of § 1964(a) requires a showing of a reasonable likelihood of future RICO violations before entering any equitable remedies. Third, the Court noted that one of the purposes of civil remedies under § 1964(a) is "to divest the association of the fruits of its ill-gotten gains." *United States v. Turkette,* 452 U.S. 576, 585, 101 S. Ct. 2524, 69 L. Ed. 2d 246 (1981). Finally, based on the foregoing conclusions, the Court held that disgorgement prevents and restrains future RICO violations and is appropriate as an equitable civil RICO remedy.

Our Court of Appeals, in a 2-1 opinion written by Judge Sentelle, interpreted § 1964(a) to authorize only those remedies that are enumerated in the statute and equitable relief that "prevents and restrains" a defendant from engaging in future RICO violations. Accordingly, this Court is limited to ordering "remedies explicitly included in the statute," and "remedies similar in

nature to those enumerated," *see United States of America v. Philip Morris, Inc.*, 396 F.3d 1190, 1200, 1197 (2005) (quotations and internal citations omitted). Finding that all examples of appropriate remedies given in the text of the statute are "aimed at separating the RICO criminal from the enterprise so that he cannot commit violations *in the future*," *id.* at 1198 (emphasis in original), and that the terms "prevent and restrain" are also "aimed at future actions," *id.* at 1199, the D.C. Circuit concluded that remedies similar in nature to those enumerated are "forward-looking remedies that are aimed at future violations," *id.* at 1198.[86]

Although the Government initially sought $289 billion in disgorgement in this case, Judge Sentelle's majority opinion explained that disgorgement is not an available remedy under § 1964(a) because it is not forward looking and does not separate the RICO criminal from the enterprise. The court characterized disgorgement strictly and narrowly as a "backward-looking rem-

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[86] Recently, the Tenth Circuit, without expressing an "opinion regarding whether, or in what circumstances, disgorgement is authorized under RICO" held that the presence of the term "restrain" in a statutory grant of general equity jurisdiction is not dispositive evidence of Congress's intent to limit remedies to those that are forward-looking. *United States v. Rx Depot, Inc.*, 438 F.3d 1052, 1058-1059 (10th Cir. 2006) (declining to apply the D.C. Circuit's interpretation of the term "restrain" and upholding the Supreme Court interpretation permitting disgorgement as a forward-looking remedy in cases brought under § 332(a) of the FDCA). *Rx Depot* followed virtually the same analysis of a court's equitable powers to "restrain" violations as this Court did in Order # 550, relying heavily on *Porter v. Warner Holding Co.*, 328 U.S. 395, 398, 66 S. Ct. 1086, 90 L. Ed. 1332 (1946) and concluding that disgorgement is allowed under the Federal Food Drug, and Cosmetic Act, which states that "district courts . . . shall have jurisdiction, for cause shown to restrain violations." *Id.*

edy focused on remedying the effects of past conduct to restore the status quo." *Id.* at 1198. Judge Sentelle's opinion distinguished between acting to "prevent and restrain" and acting to "discourage," and concluded that the general deterrence created by disgorgement "insofar as it makes RICO violations unprofitable" may not necessarily "prevent and restrain" future RICO violations. *Id.* at 1200. Consequently, the court found that disgorgement is not a forward looking remedy aimed at future violations, and therefore is not similar to those enumerated in § 1964(a). Additionally, because the court determined that disgorgement is "aimed at separating the criminal from his prior ill-gotten gains" and not intended to "separat[e] the criminal from the RICO enterprise to prevent future violations . . . [disgorgement] may not be properly inferred from § 1964(a)." *Id.* at 1200.[87]

Accordingly, this Court may not, as a matter of law, order disgorgement and may order only such remedies as are designed to "prevent and restrain" Defendants from committing future RICO violations by separating them from the RICO enterprise.

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[87] This determination has created a Circuit split. Contrary to the D.C. Circuit, both the Fifth and Second Circuits have adopted a standard of relief that permits disgorgement where it will prevent and restrain future RICO violations. As the Second Circuit reasoned, disgorgement may serve the goal of preventing and restraining future violations where "there is a finding that the gains are being used to fund or promote the illegal conduct, or constitute capital for that purpose." *United States v. Carson*, 52 F.3d 1173, 1182 (2nd Cir. 1995); *see also Richard v. Hoechst Celanese Chem. Group*, 355 F.3d 345, 354-355 (5th Cir. 2003) (adopting the standard set forth by the Second Circuit but denying disgorgement on other grounds).

Defendants argue that the Court can enter none of the Government's proposed remedies. First, they interpret Judge Sentelle's opinion so narrowly as to preclude any remedy other than a standard injunction restraining future RICO violations. Specifically, Defendants argue that, as a consequence of the standard which they advocate, the Court cannot consider the public interest in fashioning remedies. Second, Defendants argue that the mere existence of the MSA renders any remedy which the Court may enter duplicative and therefore inappropriate. Finally, Defendants claim that they did not receive fair notice of the remedies which the Government seeks and, therefore, the Court cannot enter any of the requested relief.

Defendants are wrong for the following reasons.

First, unless a specific remedy would countermand statutory guidance from Congress, a court must take into account the public interest when considering whether its imposition is justified. *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 26, 115 S. Ct. 386, 130 L. Ed. 2d 233 (1994) ("As always, when federal courts contemplate equitable relief, our holding must also take account of the public interest"). Defendants argue that "any perceived benefit to the public interest cannot determine the outcome if consideration of all the equities . . . tip the balance the other way." JD Corrected Post-Trial Brief at 154-55. There is no question that a court sitting in equity may not "override Congress' policy choice, articulated in a statute, as to what behavior should be prohibited." *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 121 S. Ct. 1711, 149 L. Ed. 2d 722 (2001) (reversing a medical necessity exception to an injunction that was granted on grounds of

public interest, where the statute clearly prohibited the behavior). However, a court may consider the public interest when determining what types of remedies to fashion pursuant to a statute's dictates. *Id.* at 498, 121 S. Ct. 1711 ("To the extent the district court considers the public interest . . . the court [may evaluate] how such interest . . . [is] affected by the selection of an injunction over other enforcement mechanisms."). Thus, the Court is not precluded from considering the public interest when it decides on the appropriateness of remedies.

Second, Defendants' claim that the existence of the MSA precludes all relief sought here is unpersuasive. Defendants rely on *Ellis v. Gallatin Steel Co.*, 390 F.3d 461 (6th Cir. 2004), to argue that this Court is precluded from issuing any remedies because the MSA already enjoins Defendants' future RICO violations. However, this case is distinguishable from *Gallatin Steel* in a number of significant ways. In that case, two private citizens sought injunctive relief to prevent a steel manufacturer and slag processor from allegedly violating the Clean Air Act ("CAA") after a consent decree had been issued. The Sixth Circuit found that because the parties first entered into the consent agreement, additional injunctive relief would violate its terms and frustrate its purposes.

First, the Sixth Circuit reversed the district court's imposition of an injunction in *Gallatin Steel* because the CAA primarily serves the public interest, and "citizens acting as 'private attorneys general' to enforce the [CAA who] seek relief . . . and accordingly 'personalized' remedies are not a first priority of the Act." *Id.* at 477. In this case, however, it is the Government that seeks

remedies for the harms Defendants have caused smokers and potential smokers as well as the American public as a whole. Where private citizens were seeking redress in *Gallatin Steel*, in this case, Plaintiff, the United States Government, is acting in the public interest.

Second, the court in *Gallatin Steel* rested its opinion on conditions that are not present here. First, it found that the consent decree covered all the claims brought by the parties. *Id.* at 476. In this case, however, there are remedies distinct from and additional to those that were included in the Master Settlement Agreement. Furthermore, the MSA is enforced by the states, whereas the remedies sought in this case will be enforced by the federal government. Finally, here, certain of the Defendants in this case are not even parties to the MSA and therefore not bound by its provisions.

Third, the timing of the claims brought by the citizens in *Gallatin Steel* also distinguishes that case. In *Gallatin Steel*, the district court granted plaintiffs' injunction when the consent decrees were only three months old, "meaning that the remedial requirements imposed by the decrees either had just been completed or had not been completed at all." *Id.* at 476. By contrast, the MSA was implemented in 1998, providing eight years for Defendants to meet and complete the requirements imposed by that agreement. At this point, after eight years, the weaknesses of the MSA are well known, whereas the three month period in *Gallatin Steel* was clearly insufficient. Additionally, because portions of the MSA are due to expire soon, there is no danger that the remedies sought by the Government will be duplicative of those already contained in the MSA.

Because of the distinguishing factors set forth above, this Court finds no compelling reasons to follow the Sixth Circuit's ruling in *Gallatin Steel*. Accordingly, the Master Settlement Agreement does not preclude any remedies this Court may impose.

Finally, as a general matter, parties must be given fair notice of the remedies sought by opposing counsel. Defendants argue that they were not given sufficient notice of the remedies the Government requests. As the circuit courts have held, however, "surprise alone is not a sufficient basis for appellate reversal; appellant must also show that the procedures followed resulted in prejudice." *Socialist Workers Party v. Illinois State Bd. Of Elections*, 566 F.2d 586, 587 (7th Cir. 1977) (finding that fair notice was given where appellants received a brief from opponent seeking injunctive relief and where more formal notice would not have provided defendants with greater opportunity to alter the result); *see also United States v. Microsoft Corp.*, 253 F.3d 34, 103 (D.C. Cir. 2001) (finding that fair notice was not given where defendants were denied a "basic procedural right to have disputed facts resolved through an evidentiary hearing"). Where injunctive relief is sought, both parties must be given an opportunity to have a remedies hearing. *See generally* Fed. R. Civ. P. 65. In *Microsoft* the court failed to allow defendants a hearing on remedies, despite their repeated requests. By stark contrast, in this action, Defendants received the Government's proposed remedies almost two months before the remedies trial and had an additional twelve days after the conclusion of the liability phase to prepare for the remedies phase. Defendants participated in a fourteen day remedies trial which was fully briefed, and at which thirteen witnesses testified. They had a full opportunity to cross-

examine all Government witnesses. Moreover, Defendants point to no specific witness they were unable to cross-examine and no substantive area of testimony they were unable to rebut because of the alleged lack of notice. Accordingly, the Government's remedies requests do not abrogate Defendants' procedural rights.

B. Specific Remedies

The Court will address each of the Government's proposed remedies *seriatim*.

1. Prohibition of Brand Descriptors

As described in detail in the Findings of Fact, *supra*, cigarettes marketed with descriptors such as "low tar," "light," "mild," and similar terms are no less likely to be harmful than other cigarettes. The terms themselves have no standardized meaning aside from a non-enforceable industry practice to apply the "light" descriptor to cigarettes with 7 to 14 milligrams of tar as measured by the FTC method, and "ultra light" to cigarettes with fewer than 7 milligrams of tar. Keane WD, 56:14-23; Mulholland WD, 26:4-27:9; *accord* Henningfield WD, 56:8-11. Of even greater concern is the fact that Defendants design "light" cigarettes to allow smokers to obtain much higher levels of nicotine than are measured by the FTC method, and in fact manipulate cigarettes to provide sufficient nicotine delivery to create and sustain addiction. Burns WD, 29:6-13; Monograph 13, DXA0310399-0650 (U.S. 58700).

The trial record overwhelmingly demonstrates that Defendants developed and marketed low tar and nicotine brands in order to dissuade smokers from quitting smoking. *See* Findings of Fact Section V(E). Defendants know that health concerns are the primary moti-

vation for smokers' attempts to quit. They have conducted extensive research on quitting to help them identify, understand, and deter potential quitters. Defendants' internal documents show that they were confident that if they could convince potential quitters that low tar cigarettes were a healthier choice and an acceptable alternative to quitting, they could keep their sales from declining. *See also* Burns WD, 41:12-18, 46:21-47:9, 49:11-20.

Based on that knowledge, Defendants introduced a number of brands and brand extensions lower in tar and nicotine and positioned them as 'health reassurance' brands to meet the health concerns of smokers. Defendants' own internal research showed that "smoking low tar and nicotine helped a smoker to reduce guilt about smoking and thus made a smoker less likely to quit. Smoking a 'health reassurance' product with its low tar FTC rating was a 'compromise' to justify not quitting." Dolan WD, 106:14-107:2; 118:4-8; 118:23-119:21; 126:8-16; *accord* Burns WD, 69:3-14 (beginning in the 1950s, Defendants "introduced and marketed filtered cigarettes and 'low tar and nicotine' cigarettes as an effort to prevent smokers from quitting based on growing health concerns among smokers"). As a result, consumers labor under a longstanding and pervasive misconception that "low tar/low nicotine" cigarettes are safer than their full flavor counterparts. *See* Findings of Fact Section V(E)(3).

As Dr. Farone testified, the terms "light" and "low tar," as used by Defendants, are "meaningless" and "arbitrary," because "light" and regular cigarettes of the same brand can have the same FTC yields:

> [T]here are lights of certain brands with higher tar levels than regulars of other brands from the same company, and there are also lights and regulars of the same brand that have the same FTC tar rating. So therefore the term 'light' is not related to tar or taste. For example, according to the most recent FTC report of tar and nicotine yields, Philip Morris sells versions of Virginia Slims and Virginia Slims Lights that both deliver 15 mg of tar by the FTC method.

Farone WD, 116:3-14; 525311179-1223 at 1185, 1207-1208, 1222 (U.S. 52977).

Gary Burger, Senior President of Research & Development for RJR, admitted in a 1997 deposition, that RJR was aware that consumers smoke low tar cigarettes for the perceived health benefit. Burger said that "[c]ertainly, smokers perceive lower tar cigarettes in some ways to be better for them and therefore they want them." He further acknowledged that consumers "have that impression that there are higher levels of bad stuff in high tar cigarettes and lower levels of bad stuff in low tar cigarettes." Burger PD, *Arch v. American Tobacco Co.*, 8/21/97, 226:9-243:18. In addition, research conducted for B & W as recently as 2000 confirmed that consumers still misperceive "lights" as less harmful. 250255060-5075 at 5064, 5066-5068, 5071-5075 (U.S. 22170); Ivey WD, 59:20-60:12.

As data have emerged establishing that "light" and "mild" cigarettes are at least as harmful as "full-flavor" brands, Defendants have developed new descriptors to convey implied health reassurance messages. B & W developed and marketed the "Kool Natural Lights" brand extension in 1998. Despite having market re-

search showing that consumers incorrectly interpret the word "natural" to mean that the cigarettes are safer than conventional cigarettes, B & W advertised Kool Natural Lights without informing consumers that "natural" cigarettes are no safer than any others. Smith TT, 1/6/05, 9178:18-9182:9; 210430297-0396 at 0322 (U.S. 67711); ADV0100742-0744 (U.S. 2701) (advertisement in 2001 issue of Rolling Stone); (U.S. 12651) (advertisement in 2000 issue of Maxim).

Significantly, although lower-yield cigarettes have dominated the U.S. market for many years, there has been no corresponding reduction in smoking-related disease among U.S. smokers; in fact, the disease risk has increased. Burns WD, 33:18-35:9; Monograph 13, DXA0310399-0650 (U.S. 58700).

Accordingly, the only way to restrain Defendants from their longstanding and continuing fraudulent efforts to deceive smokers, potential smokers, and the American public about "light" and "low tar" cigarettes is to prohibit them from using any descriptor which conveys a health message. It is not sufficient to forbid Defendants from misrepresenting the health effects of "light" and "low tar" cigarettes. By using descriptors such as "lights" and "low tar," Defendants knowingly convey the false impression that cigarettes with those labels are less harmful than other cigarettes. Consumers' false belief is so pervasive and longstanding, and has been exploited and promoted by Defendants for so long, that preventing and restraining Defendants' future fraud requires a ban on any future use of descriptors which convey a health message.

As the National Cancer Institute concluded in Monograph 13, descriptors are inherently deceptive. US

58700 at 0611, 0646. Similarly, the WHO Scientific Advisory Committee on Tobacco concluded that descriptors are inherently misleading, and recommended that "misleading health and exposure claims should be banned. . . . Banned terms should include light, ultralight, mild and low tar, and may be extended to other misleading terms." US 86658 at 0695. As set out above, Defendants' own documents, including consumer research, and testimony demonstrate that Defendants both knew and intended to use brand descriptors to convey a false perception of reduced harm. *See* Findings of Fact Sections V(E)(3, 5).

The Court will therefore order a ban on any cigarette descriptors that convey implicit health claims. Prohibition of Defendants' future use of deceptive descriptors is forward looking and narrowly tailored to prevent and restrain their future fraudulent conduct relating to the marketing of low tar cigarettes. Indeed, this remedy directly addresses the ongoing fraud Defendants commit every day with their marketing of "light" cigarettes and the virtually certain continuation of such fraud in the future in the absence of such a ban. Accordingly, beginning January 1, 2007, Defendants are prohibited from using any descriptors indicating lower tar delivery—including, but not limited to, "low tar," "light," "mild," "medium" and "ultra light"—which create the false impression that such cigarettes are less harmful to smokers.[88]

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[88] Defendants claim that prohibition of their deceptive use of descriptors "would improperly invade the primary jurisdiction of the FTC," JD PFOF, ch. 13 ¶ 599, but "[t]he FTC does not impose, regulate, or require [descriptors]. How those terms are applied, and on which brands, is entirely up to the tobacco companies." Henningfield WD, 56:8-11. Further, Defendants' claim reiterates their previous argument that

2. Corrective Communications

The trial record amply demonstrates that Defendants have made false, deceptive, and misleading public statements about cigarettes and smoking from at least January 1954, when the Frank Statement was published up until the present. *See* Findings of Fact Sections V(A)(5)(c) and V(G)(7, 8), *supra* (public statements on adverse health effects, including exposure to secondhand smoke); Section V(B)(4), *supra* (public statements on addictiveness of smoking and nicotine); Section V(C)(3), *supra* (public statements on nicotine manipulation); Section V(F)(7), *supra* (public statements on youth marketing); Section V(E)(4), *supra* (statements on "light" and "low tar" cigarettes).

Evidence in the record also amply demonstrates that certain of Defendants' public statements communicating their positions on smoking and health issues continue to omit material information or present information in a misleading and incomplete fashion. For example, Reynolds's current website statement on the health effects of smoking continues to insist that smoking "causes disease in some individuals" only "in combination with other factors." (JD 068012); *see also* Schindler TT, 1/24/05, 10810:9-10813:5 (Reynolds' recent Chairman and CEO refusing to admit that cigarette smoking causes disease).

In addition, Philip Morris's current website claims that the company's position on addiction is the same as the public health community's, but Philip Morris's state-

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such relief is preempted by the FTC Act, an argument which the Court has already rejected. *See United States v. Philip Morris, Inc.*, 263 F. Supp. 2d 72, 74(D.D.C. 2003).

ment on addiction omits the material information that nicotine delivered by cigarettes is a drug and that it is addictive. 3000172188-2188 (JD 053199).

As the Court has noted, certain language in some of Defendants' more recent positions on smoking and health issues, following their decades of denials and distortion, do represent a step forward. *See, e.g.*, Henningfield TT, 11/29/04, 7185:2-8. However, evidence in the record supports a finding that notwithstanding Defendants' self-serving claims that they have been more forthcoming on smoking and health issues, and notwithstanding a general prohibition in the MSA precluding those Defendants who are a party to it from making any "material misrepresentation of fact regarding the health consequences of using any Tobacco Product," Defendants continue to make affirmative statements on smoking and health issues that are fraudulent. MSA § III(r) at 36 (JD-045158). Accordingly, an injunction ordering Defendants to issue corrective statements is appropriate and necessary to prevent and restrain them from making fraudulent public statements on smoking and health matters in the future.

Contrary to Defendants' arguments, the First Amendment does not preclude corrective statements where necessary to prevent consumers from being confused or misled. Any interest Defendants have in avoiding compelled speech are easily outweighed by the government's interest in preventing future consumer deception or confusion. *See Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651, 105 S. Ct. 2265, 85 L. Ed. 2d 652 (1985) (upholding disclosure requirement in attorney advertising regarding terms of contingency agreement). In accordance with

this principle, our Court of Appeals has expressly held that mandatory disclosures regarding commercial products are consistent with the First Amendment when required to correct a manufacturer's campaign of deceptive or misleading marketing or to prevent consumer confusion. *See Novartis Corp. v. FTC*, 223 F.3d 783, 788-89 (D.C. Cir. 2000) (holding that the trial court was permitted to enter a corrective statement remedy because it "advances precisely the 'interest involved,' namely the avoidance of misleading and deceptive advertising"); *Warner-Lambert Co. v. FTC*, 562 F.2d 749, 769-70 (D.C. Cir. 1977).

In *Warner Lambert*, the D.C. Circuit upheld the FTC's order which required Warner-Lambert to cease and desist from representing that Listerine mouthwash prevents or alleviates the common cold, and required the company to include in future advertising the phrase "Listerine will not help prevent colds or sore throats or lessen their severity." 562 F.2d at 756. The Court rejected a First Amendment challenge to the order, finding that the protection extended to commercial speech in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 96 S. Ct. 1817, 48 L. Ed. 2d 346 (1976), which expressly permitted government regulation of false or misleading advertising, authorized an order requiring the company to make corrective statements in order to counteract its earlier, fraudulent statements. The court also upheld the FTC's position that the corrective statements were necessary because "a hundred years of false cold claims have built up a large reservoir of erroneous consumer belief which would persist, unless corrected, long after petitioner ceased making the claims." *Id.*

The Court explained, in language that is particularly applicable to this case, that:

> To be sure, current and future advertising of Listerine, when viewed in isolation, may not contain any statements which are themselves false or deceptive. But reality counsels that such advertisements cannot be viewed in isolation; they must be seen against the background of over 50 years in which Listerine has been proclaimed and purchased as a remedy for colds. When viewed from this perspective, advertising which fails to rebut the prior claims as to Listerine's efficacy inevitably builds upon those claims; continued advertising continues the deception, albeit implicitly rather than explicitly. . . . Under this reasoning the First Amendment presents no direct obstacle. The Commission is not regulating truthful speech protected by the First Amendment, but is merely requiring certain statements which, if not present in current and future advertisements, would render those advertisements themselves part of the continuing deception of the public.

Id. at 769, 96 S. Ct. 1817.

Here, too, certain Defendants have recently modified their public statements regarding the adverse health effects of smoking cigarettes and their addictiveness. Nevertheless, as in *Warner Lambert*, additional corrective statements to consumers and the public are necessary to prevent current and future advertisements from becoming "themselves part of the continuing deception of the public." 562 F.2d at 769. The injunctive relief sought here is narrowly tailored to prevent Defendants from continuing to disseminate fraudulent public state-

ments and marketing messages by requiring them to issue truthful corrective communications. *See Zauderer*, 471 U.S. at 651, 105 S. Ct. 2265.

The evidence identifies the various venues in which Defendants have made their fraudulent public statements about cigarettes, including, but not limited to, newspapers, television, magazines, onsets, and Internet websites. *See generally*, Findings of Fact. For example, from the inception of the Enterprise's fraudulent scheme, newspapers and magazines have been primary vehicles for disseminating Defendants' public statements on smoking and health issues. *See, e.g.*, 860174547454 (U.S. 21418) (1954 Frank Statement printed in 448 newspapers nationwide); 2023011263-1263 (U.S. 20371) (1994 Philip Morris "Facts You Should Know" advertisement in the New York Times); 500810940-0941 (U.S. 23036) (BATCo's Blackie Letter to Editor in 1994); TI00581619-1629 (U.S. 62969); Dawson WD, 114:18-115:21; Dawson TT, 1/12/05, 9907:21-9918:8 (ghostwritten letter to the editor challenging evidence of health effects of secondhand smoke, prepared for outside scientist to send to editors at AP, UPI, and 22 newspapers across the country, without disclosing TI's role or that scientist was a paid Tobacco Institute consultant); 513943434-3434 (U.S. 50268) (1984 RJR newspaper statement that whether smoking causes disease is an "open controversy").

More recently, Defendants—particularly Altria and Philip Morris—have used many of these same vehicles very effectively to disseminate their recently adopted Corporate Principles, including statements on smoking and health positions and alleged youth smoking prevention efforts. Szymanczyk WD, 86:22-93:3, 150:12-22. *See*

generally Keane TT, 1/19/05, 10566:4-10578:17. For example, Philip Morris and Altria have run a range of television (and radio) advertisements to improve their public image, to promote Philip Morris's website, and to warn the public that there is no such thing as a safe cigarette. *See, e.g.*, Keane TT, 10/19/05, 10577:1-25, 10620:9-18 (testimony about Philip Morris's national television and radio advertising campaign).

Accordingly, the Court will structure a remedy which uses the same vehicles which Defendants have themselves historically used to promulgate false smoking and health messages. Specifically, the Court will order Defendants to make corrective statements about addiction (that both nicotine and cigarette smoking are addictive); the adverse health effects of smoking (all the diseases which smoking has been proven to cause); the adverse health effects of exposure to ETS (all the diseases which exposure to ETS has been proven to cause); their manipulation of physical and chemical design of cigarettes (that Defendants do manipulate design of cigarettes in order to enhance the delivery of nicotine); and light and low tar cigarettes (that they are no less hazardous than full-flavor cigarettes). Within sixty days of the issuance of this opinion and order, both parties will submit a proposal for the exact wording of these statements. After the Court approves particular statements, Defendants must publish such corrective statements in newspapers and disseminate them through television, advertisements, onsets, in retail displays, and on their corporate websites, as detailed in the accompanying Order.[89]

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[89] Defendants' argument that requiring corrective statements on package onserts would conflict with the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1331 *et seq.* ("FCLAA") is unconvincing.

3. Disclosure of Documents and Disaggregated Marketing Data

As discussed in great detail in the Findings of Fact, Defendants' suppression and concealment of information has been integral to the Enterprise's overarching scheme to defraud. Not only have Defendants failed to publicly disclose all the information they internally held about their cigarettes, but they have also created false controversies about the existence of such information.

The Court finds that in order to prevent and restrain such RICO violations in the future, Defendants must create and maintain document depositories and websites which provide the Government and the public with access to all industry documents disclosed in litigation from this date forward. Disclosing such information will allow the public to monitor what Defendants are doing internally and to assess the accuracy of future information they may make available about their activities and their products. Imposing such disclosure requirements

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This remedy falls within the narrow scope of equitable powers granted to the Court under Section 1964(a) because it specifically prevents and restrains Defendants from continuing to make statements about smoking and health that are fraudulent and misleading in vehicles which are likely to reach consumers. It does not implicate Section 5(a) of the FCLAA, because Section 5(a) only prohibits "state and federal rulemaking bodies from mandating particular cautionary statements" on cigarette packages. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 518, 112 S. Ct. 2608, 120 L. Ed. 2d 407 (1992). Under the FCLAA, a "package" is defined as "a pack, box, carton, or container of any kind in which cigarettes are offered for sale, sold, or otherwise distributed to consumers." 15 U.S.C. § 1332(4). An onsert, which is only a small informational brochure attached to the outside of the "pack box, carton, or container . . . in which cigarettes are offered for sale, sold, or otherwise distributed to consumers," is not a package. Therefore, the remedy at issue does not implicate the FCLAA's preemption provision.

will act as a powerful restraint on Defendants' future fraudulent conduct. Indeed, this remedy is exactly what Judge Williams, in his concurrence in the disgorgement opinion, recommends that the District Court do under § 1964(a): "impose transparency requirements so that future violations will be quickly and easily identified." 396 F.3d at 1203 (Williams, J., concurring).

The Supreme Court has recognized, in numerous other contexts over the past century, that compelled disclosures of information can prevent and restrain future frauds. In the election context, it explained that "disclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity." *Buckley v. Valeo*, 424 U.S. 1, 67, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976) (per curiam) (discussing campaign contribution disclosure requirements); *see also Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 222, 119 S. Ct. 636, 142 L. Ed. 2d 599 (1999) (O'Connor, J., concurring in part and dissenting in part). In a different context, in *Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 637-38, 100 S. Ct. 826, 63 L. Ed. 2d 73 (1980), the Supreme Court struck down under the First Amendment an ordinance that sought to reduce fraud by charitable organizations by dictating what percentage of their income they could spend on particular activities, but observed that "[e]fforts to promote disclosure of the finances of charitable organizations also may assist in preventing fraud by informing the public of the ways in which their contributions will be employed." 444 U.S. at 637-38, 100 S. Ct. 826 (footnote omitted).

The Supreme Court has authorized injunctive relief requiring defendants who have been found to have engaged in past fraud to make ongoing public disclosures to prevent similar fraudulent conduct in the future. In *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 84 S. Ct. 275, 11 L. Ed. 2d 237 (1963), the Supreme Court held that because the Investment Advisers Act of 1940 authorized courts "to enjoin any practice which operates 'as a fraud or deceit upon any client or prospective client,'" the trial court was authorized to issue an injunction requiring the defendant to make ongoing public disclosures as a "mild prophylactic" to prevent it from repeating its past fraudulent and deceitful practices. 375 U.S. at 185, 193, 198-99.

As discussed below, most Defendants are currently subject to some public disclosure requirements for documents under the MSA. Most of those requirements will end between 2008 and 2010. Extending those obligations, and subjecting all Defendants to similar, ongoing disclosure obligations, will work to prevent and restrain them from engaging in future frauds.

The Government has also requested that Defendants be ordered to produce and make public all "health and safety risk information" in their own files relating to their products. The Government argues that disclosure of such information will prevent and restrain Defendants from making fraudulent denials about the hazardousness of their cigarettes. Although disclosure of health and safety risk information would obviously serve the public interest, the Government's request is far too broad and not narrowly tailored enough to include as a remedy.

a. Depositories

Requiring Defendants to make public the documents that they produce or use in future litigation or administrative actions, with certain safeguards to protect privileged and confidential trade secret information, is a first step towards preventing and restraining Defendants from engaging in future fraudulent activities. Document depositories will provide hard copies of documents to the public and thus will reduce Defendants' ability to suppress, conceal, or remove those documents from public access. While Defendants complain about the expense and burdensomeness of the Government's request, they are basically being required to merely extend into the future the operation of document storage facilities which have existed for almost ten years.

Currently, certain Defendants maintain the Guildford and Minnesota Depositories, which contain hard copies of documents produced in those respective sets of litigation. The May 1998 Minnesota settlement obliged the settling defendants in that case to pay for maintenance and operation of the Minnesota Depository for ten years. Those Defendants and BATCo were also required to send any additional documents produced in other smoking and health litigation to the Minnesota Depository during the same ten year period. Those obligations cease in May 2008. Neither Liggett nor Altria is subject to those obligations.

During the Minnesota litigation, BATCo created the Guildford Depository in Guildford, England, to provide the Minnesota litigants with access to documents created before the document production cutoff date in that litigation, August 18, 1994. *See* Order # 38 (protocols for United States trip to Guildford Depository for access

to pre-August 18, 1994 documents available to the public); Order # 75 ¶ 2 at 2 (same, for access to non-public "files created between August 18, 1994 and December 31, 1999"). BATCo is obliged to maintain and operate the Guildford Depository collection of documents from 1994 and earlier. *See Minnesota* Consent Judgment § VII(D) (JD093326). That obligation also ceases in May 2008.

The Court will order Defendants to continue maintaining their Minnesota and Guildford Depository obligations for an additional fifteen years. Furthermore, Defendants must provide meaningful tools to identify and analyze those documents. To that end, both document depositories must include databases which search individual documents (rather than files) by multiple bibliographic fields, such as Bates number, date, author, title, etc. Defendants are to employ the twenty-nine bibliographic fields specified in the MSA. Finally, Defendants must allow greater access to the Guildford Depository than that which is currently available. Presently, public access to the Guildford Depository is severely restricted, with only one organization and no more than six visitors allowed access per day; and copying requests often take weeks or months to fulfill. *See* Health Committee, U.K. House of Commons, The Tobacco Industry and the Health Risks of Smoking, vol. 1 (2000), (¶¶ 234, 237); 322241213-1295 at 1282-1283 (U.S. 93249); 770007956-8214 at 7994 (U.S. 88132). Defendants will be required to provide access, at a minimum, to six organizations and a dozen visitors per day.

b. Websites

Section IV of the MSA obliges certain Defendants to create and maintain document websites for all docu-

ments produced during litigation, except those which are privileged or confidential. *See* MSA § IV(c) & (e) at 36, 39 (JD 045158). *See, e.g.*, Keane TT, 1/18/05, 10376:22-10377:7 (discussing Philip Morris's document website, www.pmdocs.com); McAllister WD, 8:25-9:4, 15:4-5 (discussing CTR document website, http://www.ctr-usa.org/ctr). The MSA's document website obligations expire on June 30, 2010. Neither Altria nor BATCo was a signatory to the MSA, and therefore neither is subject to these obligations.

Document websites have several significant desirable features that document depositories do not. Collections of tobacco documents placed on the web following the litigation of the 1990s, unlike the majority of non-digitized archival materials, are generally searchable through the web. In addition, relatively few members of the public are able to travel to Minnesota or England to access the Minnesota and Guildford Depositories, respectively, so a document website "increases the availability of the documents to the general public." Brandt WD, 28:1-8; Szymanczyk WD, 202:4-6.

Accordingly, the Court will order Defendants to maintain websites for all documents which have been produced in litigation for a period of fifteen years. In addition, Defendants must provide bibliographic information for each document, if it is not apparent on the face of the document, and shall make such documents searchable by multiple bibliographic fields.

c. Privilege Claims

The tobacco industry has withheld enormous numbers of documents on grounds of privilege. The defendants in the Minnesota litigation, for instance, withheld some 230,000 documents (estimated to contain over

1,000,000 pages) on grounds of privilege or confidentiality because of proprietary interest. *See State of Minnesota v. Philip Morris*, 606 N.W.2d at 682. Given the magnitude of this litigation, the volume of documents over which Defendants asserted privilege is, if anything, substantially larger. For example, BATCo alone served privilege logs in this case with 91,723 entries for 72,593 different documents that it withheld from production on grounds of privilege or protection. *See* R & R # 112 at 4 & n.3, adopted by Order # 359. In addition, as detailed in Section V(H) of the Findings of Fact, Defendants have abused these protections, using privilege and confidentiality designations to conceal potentially damaging information.

The purposes of document disclosure will be substantially frustrated unless the Court requires Defendants to provide complete and accurate information about any documents they withhold on grounds of privilege or other protection, including confidentiality. In order to provide the public with a reasonable method to determine which documents Defendants withhold on such grounds, the Court will order Defendants henceforth to provide full bibliographic information for all withheld documents, including titles (as well as a brief summary of the basis for the privilege or confidentiality assertion).

Compelling Defendants to provide accurate and updated indices of all documents they are withholding on grounds of privilege or confidentiality is the only way to guarantee transparency and ensure that Defendants do not engage in similar egregious conduct in the future. Without a Court-ordered mechanism to ensure that all appropriate documents are either disclosed, or are

logged as being withheld, Defendants will continue to suppress documents from the public. Defendants must similarly be required to identify all document fields and give meaningful explanations for all documents that they withhold on grounds of confidentiality.

Defendants will also be required to provide regularly-updated information concerning all waivers and losses of privilege and confidentiality. Indeed, in Order # 51, § III.G.9, this Court ordered Defendants to identify all documents being withheld on grounds of privilege over which a court had previously ruled that their privilege assertion had been waived or was invalid. Imposing such a requirement on an ongoing basis is necessary to ensure that accurate and current information is available concerning which withheld documents have been adjudicated nonprivileged or non-confidential. Such a requirement is also necessary to ensure that once a Defendant waives privilege over particular documents, the public is on notice if and when the Defendant refuses to make those documents public.

d. Disaggregated Marketing Data

The FTC requires Defendants to maintain disaggregated marketing data[90] and to submit it at regular intervals, under strict confidentiality, pursuant to that agency's schedule for disclosure. Such data reveals with specificity exactly what Defendants' marketing dollars are being spent on. Such information has never been available to the public because the FTC only publishes

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[90] Disaggregated data is data broken down by type of marketing, brand, geographical region, number of cigarettes sold, advertising in stores, and any other category of data collected and/or maintained by or on behalf of each Defendant regarding their cigarette marketing efforts.

the data in aggregated form.

In order to ensure transparency of Defendants' marketing efforts, particularly those directed towards youth, and what effect such efforts are having, the Court will order Defendants to provide their disaggregated marketing data to the Government according to the same schedule on which they provide it to the FTC. Disclosure of this data will prevent and restrain Defendants from continuing to make false denials about their youth marketing efforts and will enable the Government to monitor such activities. The data which Defendants provide to the Government will be disaggregated by type of marketing, brand, geographical region, type of promotion or marketing used, number of cigarettes sold, and location of marketing (e.g. in store, in magazine, etc.). Because such information is clearly proprietary, however, it will not be made public, as the Government requests. Instead, it will be disclosed only to the Department of Justice, the enforcing agent for this decree, and be subjected to appropriate protective orders, such as have already been used in this litigation with no difficulties.

4. General Injunctive Provisions[91]

Even under the narrow interpretation of 18 USC 1964(a) by which this Court is bound, the Court may

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[91] The Government has also requested a specific injunction against Defendants' ongoing and future youth marketing. Although such a remedy would certainly serve the public interest, it does not prevent and restrain future RICO violations, which, in this case, are not Defendants' continuing efforts to market to youth but rather their false denials of those efforts. Accordingly, because this injunction does not meet the standard set forth in Judge Sentelle's Opinion, the Court cannot enter such a remedy.

enjoin specific future RICO violations upon its finding of liability under 1962(c) and (d). Accordingly, Defendants will be ordered to refrain from engaging in any act of racketeering, as defined in 18 USC § 1961(1) relating in any way to manufacturing, marketing, promotion, health consequences or sale of cigarettes in the United States.

Defendants will also be ordered not to participate in the management and/or control of any of the affairs of CTR, TI, CIAR, or any successor entities.

Defendants will also be ordered not to reconstitute the form or function of CTR, TI, or CIAR.

Finally, because this is a case involving fraudulent statements about the devastating consequences of smoking, Defendants will be prohibited from making, or causing to be made in any way, any material, false, misleading or deceptive statement or representation concerning cigarettes that is disseminated in the United States.

5. National Smoker Cessation Program

As laid out in detail in the Findings of Fact, Defendants employed highly sophisticated and expensive promotional campaigns to portray light and low tar cigarettes as less harmful than full flavor cigarettes in order to keep smokers from quitting. Defendants' concerted and ongoing effort to defraud consumers regarding light and low tar cigarettes has been a calculated and extremely successful scheme to increase their revenues at the expense of smokers, potential smokers, and the American public. Over 50% of those who smoke light and ultra light cigarettes mistakenly believe that lights offer a less hazardous option to full flavor cigarettes.

Weinstein WD 53:3-18. Of the almost 47 million Americans who smoke cigarettes today, more than 81%

smoke "light" or "ultralight" cigarettes. Moreover, 70% of these smokers want to quit, but in any given year only 40% will attempt to quit and, tragically, only 2.5% will succeed. Fiore WD, 69:5-8.

To prevent future related RICO violations, the Government asks the Court to enter a remedy requiring Defendants to fund a national smoking cessation program including: (1) a national tobacco quitline network that will provide access to evidence-based counseling and medications for tobacco cessation; (2) an extensive paid media campaign to encourage smokers to seek assistance to quit smoking; and (3) a research agenda to achieve future improvements in the reach, effectiveness and adoption of tobacco dependence interventions and physician and clinician training and education. *See e.g.*, Fiore WD, 17:22-18:20.

Adoption of such a national smoking cessation program would unquestionably serve the public interest. However, under the narrow standard for § 1964(a) remedies articulated in Judge Sentelle's Opinion, the Court cannot enter such a remedy because it is not specifically aimed at preventing and restraining future RICO violations.

6. Youth Smoking Reduction Targets

There is overwhelming evidence in this case that Defendants encourage youth to smoke, track youth behaviors and preferences, market to youth based on that tracking, and accordingly, substantially contribute to youth smoking initiation and continuation. Because over 80% of adult smokers start before the age of 18, Defendants continue to pursue and profit from the youth market. Indeed, Defendants internally acknowledge that they cannot sustain the cigarette industry without se-

curing new youth smokers. To give just one example, a 1984 R.J. Reynolds document candidly states, "Younger adult smokers are the only sources of replacement smokers. . . . If younger adults turn away from smoking, the industry must decline, just as a population which does not give birth will eventually dwindle." 501431517-1610 at 1526 (U.S. 20680).

To prevent related RICO violations, the Government asks the Court to require Defendants to reduce youth smoking by 6% per year between 2007 and 2013. This remedy would provide a total reduction in smoking of 42% by 2013 among individuals between twelve and twenty years old, measured against a 2003 baseline year. Under the Government's plan, if Defendants should fail to meet their annual targets, they would be assessed $3,000 for each youth above the target who continues to smoke. The Government bases its figure on the fact that $3,000 is the upper limit on the lifetime proceeds a Defendant could expect to earn from making its brands appealing to an individual within the demographic target. Such reductions could be made in whatever fashion Defendants, who are most knowledgeable about marketing to youth, see fit, including price increases for their cigarettes, which have already been demonstrated to reduce youth smoking initiation. The government reasons that such a remedy would reduce the incentive for Defendants to make their products appealing to youth by removing their ability to profit from youth marketing and from youth smoking initiation.

Although such a remedy is forward-looking, could prevent future RICO violations, and would unquestionably serve the public interest, it is not sufficiently narrowly tailored to meet the standard articulated by our

Court of Appeals. *United States v. Philip Morris USA, Inc., et al.*, 396 F.3d at 1198-99. As Dr. Jonathan Gruber, an economist at the Massachusetts Institute of Technology, testified, the Youth Smoking Reduction Targets are an "outcome-based" remedy because they tie financial assessments to the outcome of youth smoking.[92] Youth smoking rates may increase or decrease due to input factors beyond Defendants' control. Accordingly, because the targets are aimed at reducing the public health consequences of marketing to youth and are not narrowly tailored to prevent and restrain Defendants' future RICO violations, the Government's proposed remedy cannot be entered by this Court.

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[92] Dr. Gruber based his youth smoking reduction targets on the 1997 Proposed Resolution, a draft settlement proposed by certain Defendants to Congress when it was considering federal regulation of the tobacco industry and resolution of all pending tobacco lawsuits. As Defendants vigorously argue, because the 1997 Resolution was never adopted and was merely part of a comprehensive settlement package, it would not be an appropriate basis for setting targets for reductions in youth smoking.

In addition, Dr. Gruber proposed, as one possible means for decreasing youth smoking rates, that Defendants use price increases alone to effectuate the necessary reductions. Dr. Gruber did note that Defendants have at their disposal many other tools by which they could choose to achieve the targets, but that price increases alone could yield the same result, if Defendants chose to take that course. In response, Defendants raised the concern that, with price increases, they would lose some market share (however minimal) to tobacco manufacturers who are party to neither this Order nor the MSA. As a result, those manufacturers could market to youth without any restrictions and thus undermine the very purpose of Dr. Gruber's proposal. This effect, if it occurred, would be of concern.

7. Corporate Structural Changes

Defendants have engaged in an overarching scheme to defraud smokers and potential smokers for more than 50 years, employing the research and development, advertising, marketing, and public relations capabilities of each individual company and of the Enterprise as a whole. As the evidence overwhelmingly demonstrates, Defendants' fraudulent conduct has permeated all aspects of their operations—from how they design, manufacture, and market their products to how they communicate with the public about them—and continues to this day. Such fraudulent behavior has been driven by a desire to increase company profits and avoid huge liability judgments in litigation.

The Government asserts that unless Defendants make fundamental changes in their business practices and policies, they will continue to engage in RICO violations as long as such behavior is profitable. The Government contends that a "culture of fraud" permeates Defendants' business practices and, as a result, Defendants cannot be trusted with the responsibility of identifying and implementing the necessary changes in their own companies. Accordingly, the Government requests that the Court appoint an Independent Investigative Officer ("IO")—basically a tobacco czar—to review Defendants' business policies, practices, and operations and identify and implement appropriate procedures and measures which will remove the incentives, practices, and policies that have led Defendants to commit the RICO violations for which they have been found liable in this litigation.

Specifically, the Government asks the Court to appoint an IO to review Defendants' premises, papers, and personnel. That IO would have full access to Defen-

dants' facilities, operations, employees, meetings, and records and would investigate the ways "in which the people, tasks, competencies, structures, incentives, and culture of a firm interrelate." Bazerman WD, 45:12 23. Next, the IO would identify and implement procedures and measures that will prevent and restrain Defendants from engaging in future RICO violations, including but not limited to: (a) eliminating economic incentives for Defendants to market and sell cigarettes to youth; (b) changing compensation and promotion policies for managers and executives to reduce the likelihood of misconduct; (c) requiring subcontracting of certain research to independent third parties monitored by the Court; (d) requiring the institution of programs to educate managers in order to address bias in decision making; (e) creating internal mechanisms for employees, agents and contractors to report misconduct without fear of retribution; and (f) changing oversight and reporting arrangements to produce outcomes inconsistent with misconduct. Bazerman WD, 2:11-19, 3:4-15.

The Government also proposes appointment of an Independent Hearing Officer ("IHO") who would review Defendants' compliance with this Order, determine if there are violations, and enforce measures to remedy those violations. Therefore, while the IO would investigate Defendants' business practices and compliance with this Court's Order, the IHO would serve as a quasi-judicial officer when violations are alleged by the IO.

Even though this proposed remedy might conceivably prevent and restrain Defendants' future RICO violations, it would require delegation of substantial judicial powers to non-judicial personnel in violation of Article III of the Constitution. The Court has no authority

to order such a far-reaching remedy. *See Cobell v. Norton*, 392 F.3d 461 (D.C. Cir. 2004) ("*Cobell II*"); *Cobell v. Norton*, 334 F.3d 1128 (D.C. Cir. 2003) ("*Cobell I*"). In *Cobell I*, the court appointed a Court Monitor, with the parties' consent, to "monitor and review all of the Interior Defendants' trust reform activities on behalf of certain Native American tribes and file written reports of his findings with the Court" for a period of one year. *Cobell I*, 334 F.3d at 1133-35. At the end of that year, over defendant's objection, the District Court extended the Monitorship for at least an additional year. The D.C. Circuit reversed, holding that "the district court does not have inherent power to appoint a monitor—at least not a monitor with the extensive duties the court assigned to [the Monitor in this case]—over a party's objection." *Id.* at 1141. The court noted that "it was surely impermissible to invest the Court Monitor with wide-ranging extra-judicial duties" and that this particular "Monitor was charged with an investigative, quasi-inquisitorial, quasi-prosecutorial role that is unknown to our adversarial legal system." *Id.* at 1142.

In this case, the Government's proposed remedy unconstitutionally delegates judicial powers to the Independent Hearing Officer. While it is permissible for the Court to appoint an individual to oversee and monitor implementation of a decree, here, as in *Cobell I*, the Court is being asked to give the IHO the power to conduct hearings, determine violations, and to direct changes in Defendants' actions and policies to ensure compliance with the Court's Order. The proposed IHO would have the authority to require Defendants to adopt "procedures and measures" recommended by the IO. Additionally, the IHO would have the authority to order "removal of any officer, employee, or other member of se-

nior management of any Defendant after determining that he or she acted in concert with one or more named Defendants in committing a civil RICO violation," which would obviously require the IHO to make determinations of liability. This suggested restructuring of Defendants' companies goes too far. The Court simply does not have the power to impose such a far-reaching and intrusive remedy. Accordingly, because the powers granted to the IHO constitute an impermissible delegation of Article III powers, the Court cannot enter the Government's proposed plan for oversight of the implementation of this decree by independent officers.

8. Public Education and Countermarketing Campaign

As laid out in detail in the Findings of Fact, Defendants have preserved and enhanced the market for cigarettes in part by making statements about the health effects of smoking and secondhand smoke and by denying their marketing to youth. Defendants denied that smoking and secondhand smoke cause disease long after they internally recognized that such facts were true, and thereby provided smokers with sufficient reason to maintain their addiction. In addition, Defendants spent hundreds of millions of dollars advertising their cigarettes with youth appealing imagery and campaigns which substantially contributed to youth smoking initiation and continuation. Defendants' denials of the hazards of smoking are exceptionally effective because the general public, and youth in particular, significantly underestimate all the risks of beginning and continuing to smoke.

To prevent future related RICO violations, the Government asks the Court to enter a remedy requiring

Defendants to fund a long-term, extensive, culturally competent public education and countermarketing campaign. The Government proposes a campaign with two primary purposes: (1) educating youth and adults about the hazards of smoking and exposure to secondhand smoke and (2) informing youth that Defendants are marketing to and attempting to manipulate them. This campaign would be aimed at diluting both the impact of Defendants' fraudulent statements and at undermining the efficacy of Defendants' marketing efforts towards youth. Countermarketing would very likely help to change the social environment which currently normalizes tobacco use among youth, making it less socially acceptable. Finally, providing youth with fully accurate information about smoking would serve to reduce the number of youth smokers, reduce the number of addicted adult smokers in the future, and thereby potentially reduce the economic incentives for Defendants to continue their fraud.

Adoption of such a public education and countermarketing campaign would unquestionably serve the public interest. However, under the narrow standard for § 1964(a) remedies articulated in Judge Sentelle's Opinion, the Court cannot enter such a remedy because it is not specifically aimed at preventing and restraining future RICO violations.[93]

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[93] As is obvious, the Court is not entering as remedies either the proposed national smoker cessation program or the proposed public education and countermarketing campaign. Accordingly, Joint Defendants' Motion for Judgment on Partial Findings Pursuant to Fed. R. Civ. P. 52(c) with Respect to Certain Remedies Sought by the United States is denied as moot.

9. Costs

At the conclusion of the case, upon a finding of liability, it is appropriate to award costs. "Costs are accorded to prevailing litigants . . . under Rule 54(d) of the Federal Rules of Civil Procedure."[94] *Moore v. National Ass'n of Sec. Dealers, Inc.*, 762 F.2d 1093, 1107 (D.C. Cir. 1985); *Hoska v. United States Dept. of the Army*, 694 F.2d 270, 272 (D.C. Cir. 1982). Local Civil Rule 54.1 states that "[c]osts shall be taxed as provided in Rule 54(d), Federal Rules of Civil Procedure," and specifically enumerates those costs that can be awarded to the prevailing party. LCvR 54.1(a) and (d).

Accordingly, because the United States has proven its case by a preponderance of the evidence and because the Court has found the Defendants liable under 18 U.S.C. §§ 1962(c) and (d), costs will be awarded to the Government. The United States will be required to serve and file a bill of costs in accordance with LCvR 54 within 30 days from the date of this Opinion and its accompanying Order.

A Final Judgment and Remedial Order will accompany this Opinion.

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[94] Rule 54(d) of the FRCP states: "Except when express provisions therefor is made either in a statute of the United States or in these rules, costs other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs."